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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1913

No. [illegible]47

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER,

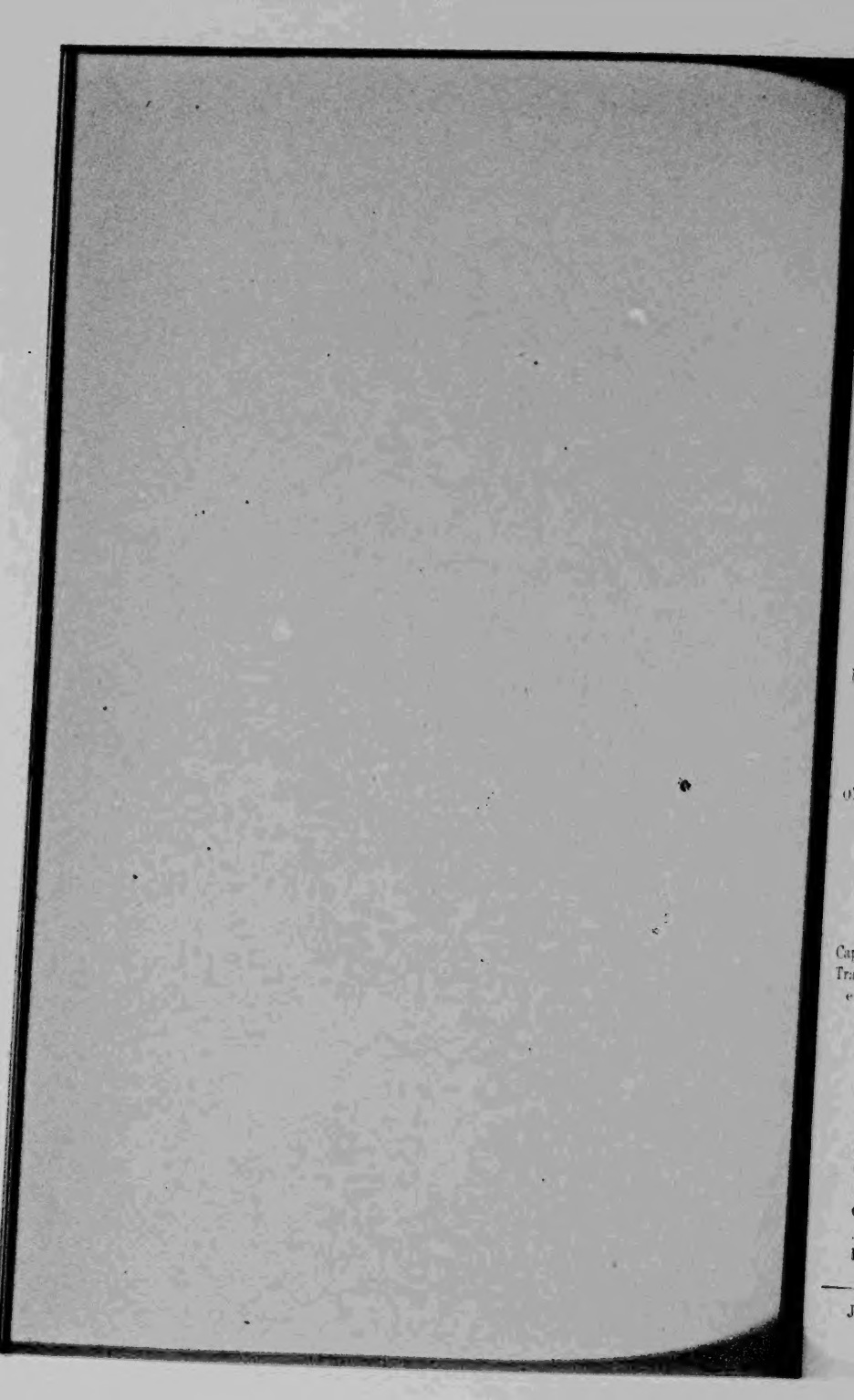
vs.

JOHN T. MOORE, ADMINISTRATOR OF JOHN ANDREW SALGUE, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 22, 1911.
CERTIORARI AND RETURN FILED NOVEMBER 22, 1911.

(22,746.)



(22,746.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 337.

HE PRUDENTIAL INSURANCE COMPANY OF AMERI
PETITIONER

vs.

IN T MOORE ADMINISTRATOR OF JOHN ANDREW
SALGUE DECEASED

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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Transcript of Record

United States Circuit Court of Appeals, Fifth Circuit.

No. 2034.

THE PRUDENTIAL INSURANCE COMPANY, Plaintiff in Error,
versus
JOHN T. MOORE, Administrator, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Georgia.

[Original Record Filed November 15, 1909.]

U. S. Circuit Court of Appeals. Filed Mar. 19, 1910. Charles H. Ledman, Clerk.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

JOHN T. MOORE, Administrator of the Estate of John A. Salgue, Deceased,
versus
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Life Insurance Policy. Writ of Error.

Appearances:

McDaniel, Alston & Black, Atlanta, Ga., for Plaintiff in Error (above named Defendant);

Minter Wimberly, Olin J. Wimberly, Jesse C. Harris, Macon, Ga., for Defendant in Error (above named Plaintiff).

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

JOHN T. MOORE, Administrator of John Andrew Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy.

To the Honorable the Judges of the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

The petition of John T. Moore, who sues as the administrator of John Andrew Salgue, deceased, respectfully shows:

I.

Your petitioner, John T. Moore, is a resident and inhabitant of Macon, Bibb County, Georgia, and a citizen of the State of Georgia.

II.

Your petitioner is the duly appointed, constituted and qualified administrator upon the estate of John Andrew Salgue, who, at the time of his death, was a resident and an inhabitant of Macon, in Bibb County, State of Georgia, and a citizen of the State of Georgia.

III.

The Prudential Insurance Company of America, the above named defendant, is a corporation organized under and pursuant to the laws of the State of New Jersey, and having its home office and principal place of business in the City of Newark, State of New Jersey.

IV.

Said defendant, The Prudential Insurance Company of America, is a life insurance company, and on the 10th day of July, 1905, had, and from that date up to the present has had and still has an agency and place of business in Macon, in Bibb County, Georgia, and there transacts business as an insurance company.

3

V.

Said defendant, The Prudential Insurance Company of America, heretofore, to-wit: on the 10th day of July, 1905, insured the life of John Andrew Salgue in the amount of $5,000.00, payable to the executors, administrators or assigns of the said John Andrew Salgue, the insured. All of which will fully appear by reference to the contract of insurance contained in the policy [issued] by said The Prudential Insurance Company of America to said John Andrew Salgue, dated 10th day of July, 1905, No. 674,931, a copy of which is hereunto annexed and by reference made a part hereof.

VI.

The said John Andrew Salgue, from the time of entering into said contract of insurance, whereby he became insured in said The Prudential Insurance Company of America, up to the time of his death, fully complied with all the terms, conditions, provisions and requirements of said policy of insurance.

VII.

Said John Andrew Salgue, the insured, died on the 27th day of May, 1906, being at the time of his death the holder and owner of said policy.

VIII.

The said John Andrew Salgue left no will, but died intestate, and thereafter, to-wit: on the 3rd day of July, 1906, your petitioner,

John T. Moore, was by the Honorable C. M. Wiley, Ordinary of Bibb County, Georgia, appointed administrator on the estate of said John Andrew Salgue, and duly qualified as such, and is now administrator on said estate, vested and clothed with all the rights and belongings to the office of administrator on said estate.

IX.

Thereafter your petitioner, John T. Moore, administrator as aforesaid, made and submitted to said The Prudential Insurance Company of America proofs of the death of the said insured as required by said policy, and in all respects has complied with the conditions, terms, provisions and stipulations of said policy.

4

X.

Your petitioner, John T. Moore, administrator, as aforesaid, after the said policy became due and payable to him as such administrator, duly demanded of said defendant payment of the amount of insurance due and owing to him as such administrator under said policy, to-wit: the sum of $5,000.00, and said defendant absolutely refused to pay said insurance, and has continued to absolutely refuse to pay up to the present time, and denied and still continued to deny any liability under said policy whatsoever, and said refusal and denial of liability are absolute.

XI.

By reason whereof your petitioner shows that said The Prudential Insurance Company of America, the above named defendant, is indebted to your petitioner in the sum of $5,000.00, besides interest on said policy of insurance from July 27, 1903, and that said debt is due and remains unpaid, and said defendant fails and refuses to pay the same.

Wherefore, petitioner says that an action has accrued to your petitioner as administrator of John Andrew Salgue, deceased, to demand, have and recover of said defendant the aforesaid sum of $5,000.00 due and owing as aforesaid, together with interest thereon, and therefore he brings this suit.

Wherefore, petitioner prays that process may issue, directed to said The Prudential Insurance Company of America, requiring it to be and appear at the next term of the Circuit Court of the United States, to be holden at Macon, Georgia, in and for the Western Division of the Southern District of Georgia, to answer your petitioner's complaint.

OLIN WIMBERLY,
MINTER WIMBERLY,
JESSE C. HARRIS,
Attorneys for Petitioner.

* * * * * * *

5 In the action of the plaintiff against the defendant, Prudential Life Insurance Company of America, we the jury,

find for plaintiff the sum of five thousand dollars, with interest at 7 per cent. from July 27, 1906, with cost of suit.

May 21, 1909.

T. C. BURKE, *Foreman.*

Filed May 22, 1909.

CECIL MORGAN,
Deputy Clerk.

(Indorsements:) October term, 1907. U. S. Circuit Court for the Western Division of the Southern District of Georgia. John T. Moore, Administrator of John Andred [Andrew] Salgue, deceased, vs. The Prudential Insurance Company of America. No. 391. At Law. Action on Insurance Policy. Judgment for Pl'ff. June 1, 1909. Filed May 25, 1907. L. M. Erwin, Deputy Clerk. Minter Wimberly, Olin Wimberly, Jesse C. Harris.

Plea and Answer of Defendant.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

No. 391.

JOHN T. MOORE
vs.
PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Now comes the defendant, the Prudential Insurance Company of America, by its attorneys, McDaniel, Alston and Black, and for plea and answer to the petition in this cause filed, answers and says:

1.

Defendant admits the allegations in paragraphs 1, 2, 3, 4 and 8 of petition.

2.

In answer to paragraph 5 of petition, defendant admits that it issued the policy of insurance therein described, and that the copy of the policy attached is a correct copy; but says that said contract of insurance so obtained by said insured was obtained through gross fraud practiced upon this defendant, and on account of said fraud is void and not binding; all of which will be fully shown to the Court and the fraud practiced upon this defendant will be fully set out and described in this answer.

3.

In answer to paragraph 6, this defendant denies the allegations thereof.

4.

In answer to paragraph 7 of petition, this defendant admits that the said John Andrew Salgue died on or about May 27, 1906, but

denies that at the time of his death he was the holder and owner of a policy of insurance in the defendant company which was binding on said company, and says that the policy of insurance named in said paragraph and petition was void and of no binding force on defendant, by reason of the gross fraud practiced in its procurement; all of which will be to the Court more fully shown.

5.

In answer to paragraph 9, defendant admits that the said petitioner furnished it proofs of death of the said Salgue, but says that it knows of no other conditions, terms, provisions or stipulations of said policy with which petitioner has complied or attempted to comply.

6.

Answering paragraph 10, this defendant admits that petitioner has demanded of it the payment of the amount of said policy, and that it has refused to pay same, and has denied, and does now deny any and all liability under said policy, and says that it owes nothing, and is liable for nothing under or on account of said policy; all because *if* [of] the gross fraud practiced upon it by the said insured in the procurement of said policy, which fraud voided said policy and freed your defendant of any and all liability on account of same, all of which will be fully shown and set out in this its answer.

7.

7 In answer to paragraph 11 of petition, defendant says that it owes nothing on account of said policy, and is not indebted on account of said policy to petitioner in the sum named, or in any sum; but says that said policy was procured from it by fraud of said insured and by reason of said fraud is void, and defendant owes nothing on said policy; all of which will to the Court be shown and fully set out in this its answer.

For further answer to the petition in this cause filed, this defendant answers and says:

Every policy of insurance issued by this defendant is based upon an application made by the insured and a medical examination made by defendant's physician or medical examiner. This application and the medical examination are the bases of the proposal for insurance made to defendant company. Defendant company's action in issuing or declining a policy of insurance upon the life of an applicant for insurance is based upon the statements, representations and warranties of the applicant in his application and medical examination, and upon the medical report of its examiner upon the applicant as made in its medical examination blank and report.

The business of insuring lives is of so delicate and intricate a nature that this defendant and all insuring companies must depend most largely for information about the applicant for insurance upon statements made by the applicant himself. The highest good faith is thus required of the applicant for the proposed contract insuring his life by the insuring company. The answers and statements of

the applicant must not only be true, but they must be full and complete. The concealment of a material matter by the applicant for life insurance is as fatal to the enactment of an intelligent and upright contract by the insuring company as is a direct misrepresentation or a direct fraud practiced by the applicant upon the defendant company. Such concealment of a material fact is an actual fraud upon the insuring company and will avoid the policy issued by the company in ignorance of said fraudulent concealment. It is recognized that the fullest information as to the life, the habits, the employment, and the experience of the applicant with other insuring companies, is locked in the breast of the applicant himself. The highest good faith is thus required of the applicant in disclosing in the fullest measure such information about himself. And the concealment of material matters, which would affect the risk insured, by the insured is a direct fraud on the insurer and avoids the policy obtained by such fraud and such fraudulent concealment.

8 The defendant company recognizing the truth and necessity of what has just been set forth in this answer requires every applicant for insurance to make his application and submit to a medical examination. This was required of the said John Andrew Salgue. Copies of the said application and of the said examination of the said Salgue are hereto attached marked Exhibits A and B respectively, and are made part of this answer.

Prior to the application of the said Salgue to defendant company for insurance, and on or about June 15, 1905, the said Salgue through an application given to its agent in Macon, Georgia, Anderson Clark, Esq., applied to The Penn Mutual Life Insurance Company for a contract of insurance. The application blank of The Penn Mutual Company was filled out and signed by the said Salgue. The medical examination on this application to The Penn Mutual Life Insurance Company was made on or about June 15, 1905, by Dr. W. J. Little, its medical examiner in Macon, Georgia. The said Dr. Little in examining the said Salgue found that he had organic heart disease. The examination of his heart showed that he had a mitral murmur of the heart, a hypertrophy of the heart, and faulty compensation of the heart. This condition of his heart made the said Salgue uninsurable as an applicant with this condition of heart would not be insured by this or any other company. Said Dr. Little told the said Salgue that he had heart disease and advised that he at once see his family physician about it. This said application for insurance was rejected by The Penn Mutual Life Insurance Company by and through its authorized examiner, Dr. Little, and the medical fee for said examination was paid by the said Anderson Clark and afterwards repaid to the said Anderson by the said Salgue.

Immediately after this information was given to the said Salgue by the said Dr. Little as to the condition of his heart, he consulted his family physician, Dr. J. C. McAfee, Macon, Georgia. Dr. McAfee discovered the heart trouble which Dr. Little had discovered and gave medical treatment to the said Salgue for this heart trouble.

Although advised of the condition of his heart by the said Dr. Little and by the said Dr. McAfee, and although he had just been

rejected by the said The Penn Mutual Life Insurance Company for insurance, the said Salgue at once applied to other companies for insurance in various and large sums. Almost immediately, to-wit, on June 28, 1905, the said Salgue applied to the Sun Life Insurance Company of Canada for $6,000 of insurance, and on June 30th to the Provident Savings Life Insurance Company of New
9 York for $5,000 or other large sum of insurance; and on July 6, 1905, to this defendant for $5,000 of insurance; and on July 8, 1905, to the Aetna Life Insurance Company for $6,000 of insurance; and July 13th, 1905, to the Volunteer State Life Insurance Company of Tennessee for $5,000 or other large sum of insurance.

All these applications were made to these different companies with the full knowledge on the part of the said Salgue that he had heart disease and in an effort to get as much insurance as possible, or as much as he was able to pay for. Within thirty days after having been informed of his heart trouble, the said Salgue applied for approximately $40,000 of insurance.

When the said Salgue on July 6, 1905, applied to this defendant company, it was necessary that he fill out and sign an application *of* said insurance. This application was taken by C. M. Adams, Esq., agent of defendant company at Macon, Georgia. This application, copy of which is hereto attached, was signed by the said John Andrew Salgue and witnessed and dated by the said Adams, the said agent of defendant company, on July 6, 1905.

At the foot of this application, and immediately preceding the signature of the said Salgue is the following language:

"I hereby declare and warrant that I am in good health and of sober and temperate habits, and that all the statements and answers to the above questions are complete and true, and that the foregoing, together with this declaration, shall constitute the application and become a part of the contract of insurance hereby applied for. And it is agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full, while my health is in the same condition as described in this application."

(Signed) "JOHN A. SALGUE."

This was and is an express warranty on the part of the said Salgue (1) that he was in good health; (2) that he was of sober and temperate habits; (3) that all the statements and answers to the above questions were complete and true; and then follows the declaration and warranty that the questions and answers to this declaration shall constitute his application to this company for insurance and shall become a part of the contract for insurance applied for. Then follows the further agreement of the insured that this policy shall not take effect until issued and delivered by the company to him while his health is good.

10 With this defendant company, by express agreement of the insured in his application, the application is the foundation of the policy and is made part of the contract, and by express stipulation in the policy the application is made part of the contract and the policy is issued in consideration of the application.

In this application to defendant company the said Salgue warranted his answers to the questions in said application to be complete and true, and warranted and agreed that this policy contract should never take effect until delivered to him while he was in good health. The defendant company had a right to rely and did rely upon this warranty, and the breach of this warranty by said insured would be and is such a fraud upon this defendant as would void said policy contract and release this defendant of all and any liability under said contract.

Question 4-B in said application is as follows: "Has any company or association ever declined to grant insurance on your life or issued a policy of a different kind or for a sum less than that applied for? Answer yes or no."

To this question Salgue answered "No."

This answer was untrue in and because that The Penn Mutual Life Insurance Company within thirty days preceding the time of making this answer had declined to issue its insurance contract to the said Salgue, and had so declined because that he had heart disease. All of which was well known to the said Salgue and was by him fraudulently concealed from this defendant company.

It was the duty of the said Salgue to fully acquaint this defendant of this action of the said The Penn Mutual Life Insurance Company. In not doing so, he perpetrated an actual fraud upon this defendant, and such a fraud as absolutely voided the said policy contract, subsequently issued by it in ignorance of said action of said The Penn Mutual Life Insurance Company, which action was fraudulently withheld from it by said Salgue.

This defendant says that *this* action of the said The Penn Mutual Life Insurance Company in declining this insurance upon the said Salgue because that he had heart disease rendered the said Salgue absolutely uninsurable, and that if said question had been truthfully and completely answered by the said Salgue this defendant would not have issued its policy of insurance or any insurance upon said life. This defendant says that said untruthful answer of said Salgue to said question 4-B was a direct breach of his warranty that his answers in his application were complete and true, and was such a breach as voided said policy contract.

11 Question 4-C of said application follows question 4-B and is as follows:

"If yes, give name of company or companies and when."

To this question no answer was given.

This defendant says that if question 4-B had been truthfully answered, question 4-C would have revealed the said rejection by the said The Penn Mutual Life Insurance Company, and that the fraud of answering question 4-B untruthfully led to the further fraud of concealment which lay in not answering question 4-C at

All of which fraud and concealment this defendant says was actual fraud upon it and a breach of the said warranty of said ted which voided said policy contract.

uestion 4-D follows question 4-C in the said application and is llows: "Is an application for insurance on your life pending at time in any other company? If so, give name of company." question was answered by the said Salgue as follows, "Yes, ident Savings Life." This answer was not complete and true as anted by said insured. On the contrary, shortly after said ne had been declined insurance by the said The Penn Mutual Insurance Company, and prior to his making application to defendant company, he had on June 28, 1905, applied to the Life Insurance Company of Canada for $5,000 of insurance. pending application in this company at the time of his making ication to defendant was well known to the said Salgue, but concealed by him from defendant company, and its existence made known by him. This defendant says that this conceal- of this material fact was a direct fraud upon it, practiced by insured, and was a breach of his warranty that his answers to questions were full and complete, which breach voided said y contract.

fendant further says that said contract of insurance never be- effective because that it was never delivered to the said Salgue he was in good health, but it was delivered to him while in ealth, which state of health was well known to the said Salgue e time the policy was delivered to him. This defendant says the warranty of the said Salgue in his application that he was od health was untrue, but that at the time he made said war- he was in bad health and that this fact was well known to the Salgue, and that this fraudulent warranty on his part voided the said policy. This condition of the said Salgue's health and the facts showing that it was not good at this time, but was extremely bad, are hereinafter fully set forth in this r.

fendant further says that on the same day that the said Salgue d for insurance he was examined for same by Dr. W. R. Win- r, medical examiner of defendant company at Macon, gia. This medical examination blank is headed, "Declarations and signed by the applicant in the presence of the medical ner of the Prudential Insurance Company of America." medical examination is made up in large part of questions put applicant and answers made by him. In this way defendant any seeks to obtain such information from applicant as will it to determine intelligently and in fairness to its other holders whether or not the applicant is a proper party to be d. Again, it is the prime duty of this applicant to make full, ete and truthful answers to the questions asked him in this al examination, and concealment by him of facts material to k will be and is such fraud on his part as will void the policy ct.

At the end of the questions and answers is the following warranty on the medical examination by the insured:

"I hereby warrant that the answers to these questions are true and agree that they shall form a part of the contract for insurance applied for." John A. Salgue made this warrant and on this medical examination, at the end of these questions and beneath this warranty signed his name on July 6, 1905. This said warranty on the part of said Salgue made this medical examination, his questions and answers therein, a part of the contract of insurance applied for. The falsity of any answer to any of the questions propounded to him would be a breach of said warranty, and such a fraud upon defendant company as would void its policy.

Question 13 of this medical examination is as follows: "Has your application for insurance ever been rejected, postponed or modified by an insurance company, assessment society, or benevolent order?" To this question the said Salgue answered "No". This answer was untrue and concealed from the medical examiner of this company the fact of the declination of the said Salgue by the said The Penn Mutual Life Insurance Company the facts concerning which have been heretofore fully narrated in this answer. It was the duty of said applicant in seeking to enter into a contract with this company to fully inform the medical examiner of this declination and the cause thereof, and such false answer and concealment on his part was such an actual fraud on this defendant and such a breach of his warranty that his answers were true, and contained so vital a concealment of his real condition as to render its policy contract, subsequently issued in ignorance of said concealment and fraud, void.

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The question and answer to question 16 are as follows: "Are you in good health?" Answer "Yes." And to question 17, "When were you last attended by a physician?" Answer: "Early spring of 1905." "For what complaint?" Answer: "Bilious fever" (?) two days". The answers to these questions were each and all untrue and fraudulently concealed the true state of his health, and the facts of medical attendance upon him, from this defendant and its medical examiner.

These fraudulent answers were made by the said Salgue although he well knew that they were not correct. The said Salgue from January, 1905, up to the time of applying for this insurance and receiving his policy contract was in bad health, and his condition of bad health was well known to him. The said insured's answer that he was last attended by a physician in the early spring of 1905 for a bilious fever for two days was untrue and was known by him to be so at the time it was made. As a matter of fact, he was under the treatment of his physician Dr. J. C. McAfee, from January, 1905, up to and beyond the date of his medical examination by this company. During this period he was treated by Dr. McAfee for chronic gastritis. During this time his stomach was repeatedly washed out by the said Dr. McAfee. Some of the dates of this treatment were during this year of 1905 as follows: January 5, 9, 10,

1, 12, 15, 17, 20; March 29, 30, 31; April 1, 3, 5, 7, 10, 12, 14, 6, 18, 20, 22, 24, 26, 28; May 2, 4, and 8.

In addition to this kind of treatment the said Dr. McAfee for said isease also repeatedly gave the said Salgue electrical treatment, and me of the dates of this electrical treatment during this year 1905 ere as follows: May 9, 11, 13, 15, 17, 19, 21; July 1 and 3. inally the said Dr. McAfee treated him for heart disease, having iscovered as heretofore related that his heart was seriously involved d that he had organic heart disease.

With a full knowledge on his part of this disease of his stomach d this bad condition of his health, and with full knowledge of his art disease, and with full knowledge of his repeated treatment by s physician as just narrated, the said Salgue fraudulently con- aled all of these facts from this defendant company and from its edical examiner, and fraudulently replied that he was in good health and that he had only been treated in the early spring of 1905 for bilious fever, and fraudulently misrepresented the state of his health as just narrated; all of which was a ss fraud upon this defendant, which fraud induced this defend- t to enter into this contract of insurance in ignorance of the true ndition of this applicant's health and in ignorance of all the said ncealed facts, and was such a breach of his warranty that his swers were true as to void, and which did void, this policy con- ct, and does relieve this defendant of any and all liability under on account of same.

In question 23 of the medical examination the said applicant was ed if he had ever had palpitation of the heart; to which he swered "no". This question related to heart trouble. It was the y of applicant when asked this question to tell the medical exam- r of defendant company of his heart trouble; of his having been ormed by Doctors Little and McAfee that he had heart disease; is having been treated for it by Dr. McAfee. His answer to this stion concealed all this from defendant's medical examiner and such a breach of his said warranty as to void said policy.

n this same question No. 23 the applicant was asked of he had had dyspepsia. To this he answered "No." It was his duty n asked this question to have told the examiner that he had been ted for chronic gastritis, which is a form of this trouble; and concealment of this disease of chronic gastritis in this answer to question was a fraud upon the company and such a breach of said warranty that his answers were true as to render said policy .

uestion 24 is as follows: "Have you ever had any serious ill- ?" Answer: "No". "When?" No answer. "How long sick?" nswer. "Nature of illness?" No answer.

efendant says that the answers to these questions were untrue were known to be so at the time made by said applicant; that applicant had had and still had heart disease and chronic gas- , both of which are serious illnesses and both of which should been given by said Salgue in his answer to said question. De- ant says that it was the duty of said defendant to name these

two diseases in answer to these questions, and to have answered instead of left unanswered the questions following the first question. The applicant in seeking this policy of insurance did not act in good faith with this defendant, but fraudulently concealed these two serious illnesses from defendant, and untruthfully stated that he had never had any serious illness; all of which was a fraud upon defendant and such a fraud and such a breach of said warranty
15 that his answers were true as to void said policy contract.

Defendant says that all of these fraudulent representations and concealments were made by said Salgue knowingly for the purpose of procuring from this defendant its contract for insurance on his life. Defendant says it relied on these statements believing them to be true, as it had a right to believe; that it acted upon them; that it was grossly deceived by them; that they all covered matters material to the risk to be assumed and contracted by it; that if they had not been made to it, or if the truth had been told it, that no contract of insurance on said Salgue's life would ever have been made by it and that on account of said fraudulent conduct and concealment on the part of the said Salgue, all of which was warranted against by the said Salgue, its said policy contract was rendered null and void.

Defendant says that within less than one year after its policy contract was issued to the said Salgue he was found dead on the train coming from Flovilla to Macon, Georgia; that he had been suffering from and treated for heart disease, and that the coroner's jury at the inquest over his body found and determined that he had died of heart failure; and says that said Salgue did die of heart failure, which is heart disease. His death from heart failure served to indicate the materiality to the risk assumed by this company in its contract of insurance of the many concealments and fraudulent statements made by him and hereinbefore fully set out in this answer.

For the reasons hereinbefore set out this defendant says that no valid contract of insurance binding upon it has ever been entered into between it and the said Salgue, and this defendant has heretofore, to-wit, on the 30th day of Sept., 1907, tendered to petitioner in this cause, who is administrator and legal representative of the said Salgue, the sum of $210.00 in legal currency, the same being the amount of premium paid by the said Salgue to it on said policy, together with seven per cent interest on the same, and says that said tender was declined and refused by said petitioner; and defendant herein tenders said premium with legal interest on same to petitioner and intends this to be a continuing and continuous tender of said premium with interest, and says that this premium and interest is all that can possibly be claimed to be due by petitioner on account of said policy.

And having fully answered this defendant prays that it be hence discharged with its reasonable cost in this behalf incurred.

McDANIEL, ALSTON & BLACK,
Attorneys for Defendant.

16 (Endorsement:) No. 391. In the Circuit Court of the United States for the Western Division of the Southern Dis-

trict of Georgia. John T. Moore, Admr., vs. Prudential Ins. Co. of America. Answer of Defendant. Filed Oct. 1, 1907. Cecil Morgan, Deputy Clerk McDaniel, Alston & Black, Attorneys for Defendant.

Order to try cases together, &c., hereinafter printed at page 33.

* * * * * * *

Motion to Direct Verdict.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

JOHN T. MOORE, Administrator, etc.,
vs.
THE PRUDENTIAL LIFE INSURANCE COMPANY and THE AETNA LIFE INSURANCE COMPANY.

Complaints Consolidated for Trial.

Now comes the defendant, The Prudential Insurance Company of America, by its counsel of record, and moves the Court not to submit said case to the jury, but to direct a verdict in its favor upon the ground that the evidence introduced upon the trial of said case, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, and demands that a verdict be directed in its favor.

McDANIEL, ALSTON & BLACK,
Attorneys for Defendant The Prudential Ins. Co. of America.

(Endorsement:) No. 391. U. S. Circuit Court, Western Division, Southern District of Georgia. John T. Moore, Admr., etc., vs. Prudential Insur. Co. of America, Aetna Life Insurance Co. Motion for direction of verdict in favor of Defendants. Filed May 19, 1909. Cecil Morgan, Deputy Clerk.

(See page 6 for Verdict which should appear following the above request.)

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

JOHN T. MOORE, Administrator,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action of Insurance Policy.

Upon motion of Minter Wimberly, Olin J. Wimberly and Jesse Harris, attorneys of record for the plaintiff in the above stated cause,

it is ordered that judgment be entered upon the verdict heretofore, to-wit: on May 22, 1909, rendered in favor of plaintiff and against the defendant, The Prudential Insurance Company of America, in the sum of Five Thousand Dollars ($5,000.00) principal and Six Hundred and Thirty Six Dollars and ten cents ($636.10) interest and costs.

It is, therefore, considered and adjudged that plaintiff, John T. Moore, Administrator, do have and recover of and from the defendant, The Prudential Insurance Company of America the sum of Five Thousand Dollars ($5,000.00) principal and Six Hundred and Thirty Six Dollars and ten cents ($636.10) interest, together with costs, and all future interest at seven per cent, that may hereinfater accrue, the same being the amount found by the jury to be due and owing by the defendant.

EMORY SPEER, *Judge*.

Dated this 1st day of June, 1909.

MINTER WIMBERLY.
OLIN J. WIMBERLY.
JESSEE HARRIS.
Attorneys for Plaintiff

(Endorsement.) In the Circuit Court of the United States for the Western Division of the Southern District of Georgia. John T. Moore vs. The Prudential Insurance Company of America. Judgment. Filed June 1, 1909. Cecil Morgan, Deputy Clerk. Minter Wimberly, Olin J. Wimberly, Jessee Harris, Att'ys for Plaintiff.

18 In the Circuit Court of the United States for the Southern District of Georgia.

At Law. No. 391.

JOHN T. MOORE, Administrator of JNO. A. SALGUE,
vs.
THE PRUDENTIAL INSURANCE CO.

Verdict for plaintiff May 21st, 1909.
Judgment for plaintiff June 1st, 1909.

It being represented to the Court that it is the intention of the defendant to prosecute a writ of error from this Court to the Circuit Court of Appeals of the Fifth Judicial Circuit and it appearing that it will be difficult for defendant to prepare and present its bill of exceptions in this cause prior to September first, 1909, it is ordered that this defendant have until that date to present and have allowed, settled, and certified, its bill or bills of exception in this cause, and that execution be stayed until that time. This order is made at the term at which said cause was tried and judgment upon said verdict entered.

In open Court, July 2, 1909. EMORY SPEER, *Judge*.

(Endorsement:) U. S. Circuit Court, Western Division, Southern District of Georgia. John T. Moore, Admr., etc., vs. Prudential Insur. Co. of America. Order allowing to Sept. 1/09 to file Bill of Exceptions. Filed July 2, 1909. Cecil Morgan, Deputy Clerk.

In the Circuit Court of the United States for the Southern District of Georgia.

JOHN T. MOORE, Administrator of John Andrew Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

It being represented to the Court that it is the intention of the defendant to prosecute a writ of error from this Court to the Circuit Court of Appeals for the Fifth Judicial Circuit, and it further being made to appear that it has been impossible for the defendant
19 to prepare the bill of exceptions in this cause up to this time and that it will be impossible for said bill of exceptions to be presented before October 1st, 1909;

It is ordered that the defendant have until October 1st, 1909, to present bill of exceptions and assignment of errors and to have same allowed, settled and certified, and that execution be stayed until said October 1st, 1909. This order is made at the term at which said cause was tried and judgment upon said verdict entered.

This August 11th, 1909.

EMORY SPEER,
U. S. Judge.

(Endorsement:) U. S. Circuit Court, Western Division, Southern District of Georgia. No. 392. John T. Moore, Admr., vs. Prudential Life Insurance Co. of America. Order extending time for filing Bill of Exceptions, etc. Filed August 13, 1909. Cecil Morgan, Deputy Clerk.

Petition for Writ of Error.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

JOHN T. MOORE, Administrator of Jno. A. Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Action on Insurance Policy.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy.

Consolidated for Trial.

And now comes the Ætna Life Insurance Company of Hartford, Conn., defendant herein, and says that on or about the 1st day of

June, 1909, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which errors will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the Circuit Court of Appeals for the Fifth Circuit for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

McDANIEL, ALSTON & BLACK,
Attorneys for Defendant.

(Endorsed:) No. 16. In Circuit Court, U. S., Western Division, Southern Dist. of Ga. Jno. T. Moore, Adm'r, vs. The Prudential Ins. Co. of America. Petition for writ of error. Filed Sept. 25, 1909. Cecil Morgan, Deputy Clerk.

Order Allowing Writ of Error.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy.

JOHN T. MOORE, Administrator of Jno. A. Salgue,
vs.
ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy.

Consolidated for Trial.

This day, the 27th day of Sept., 1909, comes the defendant, the Prudential Life Insurance Company of America, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it, praying also that a transcript of the record and papers and proceedings upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow a writ of error

upon the defendant giving bond according to law in the sum of Eight Thousand Dollars, which shall operate as a supersedeas bond. This 27th day of Sept., 1909.

EMORY SPEER,
U. S. Judge.

United States Circuit Court. Filed in Clerk's Office — day of ——, 1909.

(Endorsement:) No. 16. In Circuit Court U. S., Western Division Sou. District, of Ga. Jno. T. Moore, Admr., vs. The Prudential Ins. Co. of A. Order allowing Writ of Error. Filed Sept. 29, 1909. Cecil Morgan, Deputy Clerk.

21

Assignment of Errors.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy

Consolidated for Trial

The defendant, The Prudential Insurance Company of America, in the above stated action, in connection with its petition for writ of error, makes the following assignment of errors upon which it will rely, which it alleges occurred in the trial of said cause, to-wit:

I.

That the Circuit Court of the United States for the Western Division of the Southern District of Georgia erred in passing its order of the — day of —, 1909, consolidating for trial the two causes of John T. Moore, Administrator, vs. The Ætna Life Insurance Company and John — Moore, Administrator, vs. The Prudential Insurance Company — America, which order was as follows:

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

JOHN T. MOORE, Administrator on the Estate of John A. Salgue, Deceased,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy.

At Law.

JOHN T. MOORE, Administrator on the Estate of John A. Salgue, Deceased,

vs.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy.

22 It appearing to the Court that the above stated causes pending in this court are of a like nature and relative to the same and similar questions and involve issues similar in their character, and that will avoid unnecessary costs and delay to try said causes together before the same jury.

It is thereupon consideration thereof ordered by the Court that said causes be tried together before the same jury, and that the jury render separate verdicts.

In open Court, May 13th, 1909.

EMORY SPEER, *Judge.*

This defendant, The Prudential Insurance Company of America, alleges that the court committed error in passing such order because that:

1st. The two causes of action were between different parties. One was between John T. Moore, Administrator and The Prudential Insurance Company of America, and the other between John T. Moore, Administrator, and the Ætna Life Insurance Company of Hartford, Connecticut.

2nd. Because the two causes of action were based upon separate contracts, bearing different dates, between different parties and having entirely different conditions and stipulations and being for different amounts.

3rd. Because the respective defenses of the two companies to the two causes of action were entirely different and were based upon the breach of different conditions and stipulations in the two separate contracts of insurance on the part of the said John A. Salgue, deceased, all as shown in the respective answers filed by the two companies in the two causes.

4th. Because evidence was introduced upon the trial of the two

causes consolidated which was prejudicial to the defendant, The Prudential Insurance Company of America, and which could not and would not have been introduced in the trial of a separate action against the said The Prudential Insurance Company of America, the said evidence being evidence tending to show that certain notice of the condition of health of John A. Salgue and of the prior rejection of John A. Salgue by the Penn Mutual Life Insurance Company had been communicated to the said Ætna Life Insurance Company, which evidence was embraced in the testimony of Bolivar H. Ray, Agent of the Ætna Life Insurance Company, and of Dr. C. C. Harrold, its medical examiner, and of the plaintiff, John T. Moore, all of which evidence is set forth in the bill of exceptions in this cause filed. This evidence could not have been admitted in the trial of a cause against the defendant, The Prudential Insurance Company of America, and was highly prejudicial to said Company before said jury.

This defendant alleges that the Court committed error in consolidating said causes for trial and in passing the said order of consolidation for each and all of the reasons stated.

To this order of the Court the defendant, The Prudential Insurance Company of America, duly excepted while the jury was still at the bar of the Court, which exception was duly noted and allowed.

II.

That the Circuit Court of the United States for the Western Division of the Southern District of Georgia erred in overruling and denying the motion made by counsel for this defendant, The Prudential Insurance Company of America, plaintiff in error, at the close of the evidence and before the charge to the jury to direct the jury to return a verdict for this defendant, this motion being as follows:

"And now comes The Prudential Insurance Company of America, by its counsel of record, and moves the court not to submit said case to the jury, but to direct a verdict in its favor upon the ground that the evidence introduced upon the trial of said case, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, and demands that a verdict should be directed in its favor.

(Signed) McDANIEL, ALSTON & BLACK,
Attorneys for the Defendant The Prudential Insurance Company of America."

This defendant alleges that the Court committed error in overruling and denying said motion because each and all the grounds upon which the same was granted furnished good and sufficient cause for giving the instruction asked. To the refusal of the Court to give such instruction the defendant duly excepted while the jury was still at the bar of the court, which exception was duly noted and allowed.

III.

That the said Court erred in refusing to give to the jury
24 the following instruction which the court was in writing requested by the defendant to give, said request being made while the jury was still at the bar of the court and before the charge of the Court to the jury, and to such refusal defendant then and there excepted, which exception was duly noted and allowed by the court, said exception being upon the grounds herein stated as the grounds of error for refusal to give such instruction. Said requested instruction was the following:

"The defendant, The Prudential Insurance Company of America, requests the court to charge as follows:

Question 4-B of the application of said John A. Salgue to the said The Prudential Insurance Company of America is as follows:

'Has any company or association ever decl[illegible]d to grant insurance on your life or issued a policy of a different kind or for a sum less than that applied for? (Answer 'Yes' or 'No.')' The answer to this question is 'No.'

The defendant insists that this answer is false and says that the said Salgue in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance and that this application was signed by the said Salgue and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, Examiner for the said Penn Mutual Company, for examination and that Dr. Little, as said Examiner, examined the said Salgue and stated to the said Salgue that he had heart trouble and that for this reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue, and if you believe from the evidence that such application was made and that such declination was made, then I charge you that the answer of Salgue to this question was false and that it was warranted to be true and that it was as to a material matter which would tend to change the nature, extent and character of the risk assumed and that in this event plaintiff could not recover."

Defendant, the Prudential Insurance Company of America, alleges that the Court committed error in refusing to give said instruction to the jury because:

25 1st. The instruction requested was legal and pertinent, and gave the law relative to this issue between the plaintiff and the defendant.

2d. Because the Court failed to incorporate in his charge the instructions asked for, or similar instructions to the same effect.

The evidence upon the question covered by said request was

The application of John A. Salgue to the Prudential Insurance Company contained the following questions:

4b. Has any company or association ever declined to grant in-

surance on your life or issued you a policy of a different kind or for a sum less than that applied for? Answer yes or no.

To this question Salgue answered no.

also question 4c. If yes, give name of company or companies and when.

To this question Salgue gave no answer.

In his application Salgue made the following warranty

"I hereby declare and warrant that I am in good health and of sober and temperate habits and that all the statements and answers to the above questions are complete and true and that the foregoing together with this declaration shall constitute the application and become a part of the contract for insurance hereby applied for.

In the medical examination of John A. Salgue he was asked the following questions:

No. 13. Has your application for insurance ever been rejected, postponed or modified by an insurance company, assessment society or benevolent order?

To this question he replied no

In his medical examination he made the following warranty:

I hereby warrant that the answers to these questions are true and agree that they shall form a part of the contract for insurance applied for.

Both of these warranties are dated July 6th, 1905, and signed by John A. Salgue

26 ANDERSON CLARK, on this point, also testified as follows: "My name is Anderson Clark. I live in Macon. I have been in the insurance business for eight or nine years. Yes, sir; I was in the insurance business in June and July, 1905. In June, 1905, I was with the Penn Mutual. Mr. Hoge had the agency in Macon at that time. Yes, sir; I was sole agent in Macon for the Penn Mutual Insurance Company of Philadelphia. Yes, sir; I wrote an application for John A. Salgue for the Penn Mutual; I think it was in June, what time in June, I can't say. Yes, sir; it was prior to his application to the Sun Life Insurance Company; I should say it was five or six days prior to that application. Yes, sir; took a regular application from Mr. Salgue for the Penn Mutual; he applied for six thousand dollars; he signed the application, yes sir. When that application was taken, I was in the office of the Bibb Brick Company. Mr. Salgue was Superintendent of the Bibb Brick Company. Yes sir; I think Mr. Moore was President of that. As to how it happened that I wrote Mr. Salgue this application, I had been talking insurance, explaining a certain other policy, a cheap form, to Mr. Moore, and Mr. Salgue was sitting in the office, and once, when Mr. Moore went out, he and I got into conversation about that form of policy. Yes, sir; that is the way it started. Mr. Salgue wanted five thousand dollars at that time; in fact, when it was first mentioned, he didn't say; I fixed the amount; I fixed it at five thousand. As to how I reached five thousand, I don't know; it is just customary, if you write a man more than one, to write him five or ten. As

to why that amount was increased to six thousand dollars, he told me, when I was making out his application, that he already had four thousand dollars in force, and I persuaded him to make it six, just to make it ten thousand; I just wanted as much as I could get. As to when I went to Dr. Little, he had just been appointed; that was his first examination for the Penn Mutual. As to what happened there, I took the application to Dr. Little, and told him to telephone to Mr Salgue; he telephoned, I suppose, and made the appointment with him; possibly the next day, or the next, Mr. Salgue went to Dr. Little, to be examined. No sir; I didn't go with him to the office. I think it was the next day after that, that I saw Dr. Little. Dr. Little told me he could not pass him, didn't think he could pass him, because he had heart trouble. As to whether anything else passed between myself and Dr. Little at that time, I was very much surprised when he told me he didn't think he could pass him, because Mr. Salgue was a man of such splendid physique, it
27 was very much of a surprise. As to whether I communicated that to Mr. Salgue, I think Dr. Little saw him again; that is my recollection of it, when he told me positively he could not pass him. Yes sir; Dr. Little told me. Then I wrote a note to Mr. Salgue, and gave it to an agent who was in an adjoining office, representing the Sun Life of Canada. As to the contents of that note, as well as I remember it, it was substantially a letter of introduction to Mr. Salgue for this Mr. Nowell, of the Sun Life. In the meantime, I told Mr. Salgue that I would advise him to make application to this Company, it seemed the Penn Mutual couldn't issue him a policy on Dr. Little's examination, that I didn't think Dr. Little would pass him; that was about what it was. The next time I saw Mr. Salgue was several days later, possibly four or five days, maybe more than that. No; that wasn't before the application was made to the Sun Life; that was four or five days afterward, I should say. As to the conversation that occurred between Mr. Salgue and myself at that time, in reference to this insurance, I told him that, under Dr. Little's statement in regard to it, I didn't think he could get a policy with the Penn Mutual, and that I would hold his examination up, and wouldn't make a report of it, and if he could pay the doctor's fee to the Penn Mutual, because that is customary entirely with agents, to stop examinations that way, I would pay his fee, and he could answer in future that he had never been rejected by any company. Yes, sir; he paid me the five dollars, and I paid it to Dr. Little. I don't know what became of the application itself; it was a past matter with me; I never kept a record of that sort of thing. No sir; I haven't got it. Yes sir; I wrote this in the letter to the agent of the Sun Life, and explained the facts to him. Yes sir; he understood that Dr. Little would not pass him, by my turning it over to him. As to the Sun Mutual issuing him two policies after I turned him over to them, the way that arose, the application was for three thousand dollars; I saw it when Mr. Nowell brought it back; well, as he had made application to me for six thousand, I knew that six thousand could be delivered to him, so I just told him to order out three

thousand more. Yes sir; I introduced Mr. Nowell. Yes sir; in that way, the Sun Mutual issued six thousand dollars. As to whether that was more than Mr. Salgue wanted, and he never took some of those policies, of the one I showed him, which was a very cheap form, he wanted six thousand, but when a higher priced form was shown to him, that the Sun Mutual took his application for, he only wanted three thousand of it. I don't know how long it was after the Sun Life issued this policy before he took out the second policy; no, sir, it wasn't some months; it was just a few days; that is, the first policy; I only know about the second policy. Yes sir. I said to him that I would withdraw the application before it reached the Company, then he could truthfully state he had not been rejected by any other company. As to whether I explained that to him, I don't know that I went into it at length, but that was the substance of it, that he could withdraw the application, as he had the right to do, before it went on to the Company, and he could say he hadn't been rejected. Yes sir; I am an insurance agent. We had this particular conversation at the Bibb Brick Company, when I went to get Dr. Little's fee. I had been an insurance agent about eight or nine years. As to whether I have been very active in that line, and written a good deal of insurance, I was doing more then than now. No; I haven't written a good deal of insurance, but a fair amount, in the last few years. Yes sir. I have represented a number of companies at various times. Yes sir; it is the usual thing with agents, when a man is reported unfavorably, to advise him to withdraw his application, and not make a report to the Company. No, sir, I wasn't present when Mr. B. H. Ray tried to get Mr. Salgue to accept the Aetna policy. I knew of Mr. Ray going out there to try to get him to accept it, just as I knew the other agents were after him time and time in regard to their policies; I never saw Mr. Ray deliver it. Yes sir, I knew Mr. Salgue wanted some insurance. I had some conversation with Mr. Salgue when he paid me the fee, and then afterwards when I went out with the agent of the Sun Life to deliver the policy. Yes sir; I knew when we went out there, that they had difficulty to induce him to take the insurance, because he had been over-burdened with insurance. As to whether he wrote the application of the Penn Mutual the first time, or I went out several times, I got that right now.

When I went to collect the fee from him, it was mentioned that he had made application to some other company; I forget what company it was. I told him it would be better for him to have applications pending with different companies; then, possibly, if he should happen to be rejected in any other company, it would be as I explained to him, it was just the insurance companies' nature to be always in a hurry to issue insurance if they knew it was pending in another company, to just take a man at his own risk. Yes; I wanted to make the insurance companies anxious by a good, large amount, and let them judge him on his risk, just as it appeared to them.

29 On this Point, also Dr. WILLIAM J. LITTLE testified as follows:

"My name is William J. Little. Yes sir; I live in Macon. I graduated in medicine in 1894. Yes sir; I was the Penn Mutual examiner in Macon in June, 1905. Yes sir; I recall the circumstances of Mr. Salgue coming to my office in reference to an examination to be made by me for the Penn Mutual Insurance Company. As to what happened, Mr. Salgue appeared at my office for the purpose of being examined for the Penn Mutual. I asked him a certain number of questions that are found on the blank. I noted his robustness and apparent good health, and on making what is known as the physical examination, which comprises part of the examination, I noticed that his heart was acting in a tumultuous manner, that is, in its pulsations, showed what would be termed as heaving up and down, might be termed heaving heart; it showed it was a little to the right of the normal position, a position that was under the nipple, which would indicate an enlarged heart. I then listened to the sounds of his heart, and heard the sounds different from those in health, that is, a murmur, which showed more clearly at the apex of the heart, that is, about this way (indicating) from the heart side, and was transmitted back through the shoulder blade. This sounded here more distinctly at the apex of the heart, and transmitted through the chest to the shoulder blade, or the scapula, as it is called, would indicate a disease of the heart known as mitral murmur. After discovering this sound, I was satisfied I would not pass Mr. Salgue. I told him I found some trouble that would probably prevent his getting insurance. I asked him who his doctor was, and he told me Dr. McAfee was his physician, and wanted to know of me what his trouble was. I was not examining him for the purpose of treating him, or prescribing, and I ascertained the physician who attended him. I found his heart affected, and directed him to Dr. McAfee. I saw Mr. Clark, who was the agent of the Penn Mutual, and in this particular Company, my duty was to report to him, to the agent giving me the application, as to what I found; I informed him I couldn't pass him. Mr. Clark showed a good deal of feeling about the matter, when I told him I wouldn't pass him; he asked me if I would see the man again; I told him I wouldn't object to examining him again, but I told him his condition was that of heart trouble, and it was no use.

My impression is the man came. As to what was the matter 30 with Mr. Salgue's heart, he had an organic enlargement of the mitral valve of the heart, with, at the time I saw him, what is known as a compensatory hypertrophy; that is, the heart was enlarged, the muscles were strengthened and enlarged by reason of the extra work put upon it to overcome this extra work in the valve. This enlargement was what we term hypertrophy, in order to overcome the deficiency in the valve. At the time, there were no heart symptoms that the party was aware of, which he showed. As to whether there was ever a second visit, in that I am not absolutely clear, whether he came back the second time, or not. Yes sir; it was my duty to report back to Mr. Clark, as agent, the result of the examination.

Dr. J. C. McAfee also testified on this point, as follows:

My name is J. C. McAfee. Yes sir; I live in Macon. I have been practicing medicine eleven years. Yes sir; I recall that in June, 1905, or early in July, 1905, John A. Salgue came to me in reference to a trouble that he might have. As to what occurred between Mr. Salgue and myself at that time, he came into my office, and said he had just been told by Dr. Little that he had trouble with his heart, and that Dr. Little had told him to come and see me about it, and he was there for the purpose of finding out whether or not it was true. Yes sir; I made an examination of him at the time, and found he had an organic heart disease, a disease of the valve of his heart called the mitral valve, and that his heart was doing good work at that time; that the enlargement or thickening of the heart muscles was sufficient to overcome the defect at that time. Yes sir; I did discover a mitral murmur.

Yes sir; when he came into my office direct from Dr. Little's, that was some time prior to the 19th of June. Yes sir; I took Mr. Salgue's statement for the fact that he had come to me direct from Dr. Little; he stated to me Dr. Little had said he had some trouble with his heart. Yes sir; I thereupon examined him, made a physical examination; I did not strip him to the skin; I examined him through his shirt; my recollection is I didn't have him take off anything but his coat; I don't recollect that he had an undershirt. He had a splendid appearance, physically. When I had completed the physical examination, and found he had an organic trouble of the heart, my diagnosis of the condition — that it was what we call a mitral regurgitation of the heart.

31 Wherefore, the Defendant, the Prudential Insurance Company of America, prays that the judgment of the Circuit Court of the United States for the Southern District of Georgia be reversed, and that said Court be directed to grant a new trial of the same cause.

McDANIEL, ALSTON & BLACK,
Attorneys for the Defendant, The Prudential Insurance Company of America.

Filed in office the — day of ——, 1909.

(Endorsement.) No. 16. In Circuit Court U. S., Western Division, Southern Dist. of Ga. Moore, Adm'r of Salgue, vs. The Prudential Ins. Co. Assignment of Errors by the Prudential Ins. Co. Filed Sept. 25, 1909. Cecil Morgan, Deputy Clerk.

Know all men by these presents: That we, The Prudential Insurance Company of America, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto John T. Moore, as administrator of John A. Salgue, in the full and just sum of Eight Thousand Dollars, to be paid to the said John T. Moore, his certain attorney or successor, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally by these presents

Sealed with our seals and dated this 22nd day of September in the year of our Lord, One Thousand Nine Hundred and Nine.

Whereas, lately at a term of the Circuit Court of the United States for the Western Division of the Southern District of Georgia in a suit depending in said court between John T. Moore, Administrator of John A. Salgue, plaintiff, and The Prudential Insurance Company of America, defendant, a judgment was rendered against the said The Prudential Insurance Company of America and the said The Prudential Insurance Company of America having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and the citation directed to the said John T. Moore as administrator of John A. Salgue, citing and admonishing him to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New

32 Orleans, Louisiana, within thirty (30) days from date thereof.

Now, the condition of the above obligation is such that if the said The Prudential Insurance Company of America shall prosecute said writ to effect and pay the amount of the said judgment and interest, including just damage for delay and all costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

[SEAL.] By McDANIEL, ALSTON & BLACK,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK.

By JOS. Y. ORME, *Resident V. Pres't.*
MARION M. JACKSON,
Resident Ass't Sec'y.

Approved:

EMORY SPEER, *U. S. Judge.*

(Endorsement:) U. S. Circuit Court, Wes. Div. Sou. Dist. of Ga. Jno. T. Moore, Adm'r, vs. The Prudential Insurance Co. of A. Supersedeas Bond. Filed Sept. 29, 1909. Cecil Morgan, Deputy Clerk.

* * * * * * *

Bill of Exceptions.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

JOHN T. MOORE, Administrator of John A. Salgue,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy.

JOHN T. MOORE, Administrator of John A Salgue,

vs.

AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy.

Consolidated for Trial.

Be it remembered, that on the 13th day of May, 1909, the above entitled cases came on to be heard before the above court and a jury duly empanelled, Honorable Emory Speer, Judge, presiding. The plaintiff appearing by Mess. Minter Wimberly, Olin Wimberly and Jesse Harris, his counsel, and the defendant, The Prudential Insurance Company of America, appearing by Mess. McDaniel, Alston & Black, its counsel, and the following proceedings were had:

Upon the call of the two above named cases, both sides having announced ready, upon motion of plaintiff's counsel the two cases were consolidated for trial by order of the Court under section 929 of the Revised Statutes. For the purpose of this consolidation the following order was passed by the Court:

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

JOHN T. MOORE, Administrator on the Estate of John Andrew Salgue, Deceased,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy.

At Law.

JOHN T. MOORE, Administrator on the Estate of John A. Salgue, Deceased,

vs.

AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy.

It appearing to the court that the above stated causes pending in this court are of a like nature and relative to the same and similar

questions, and involve issues similar in their character, and that it will avoid unnecessary costs and delay to try said causes together before the same jury, it is thereupon — consideration thereof ordered by the Court that said causes be tried together before the same jury, and that the jury render separate verdicts.

In open Court, May 13, 1909.

EMORY SPEER, *Judge.*

(Endorsement:) U. S. Circuit Court, Western Division, Southern District of Georgia. No. 391. John T. Moore, Admr., vs. Prudential Insurance Company of America. Aetna Life Insurance Co. of Hartford, Conn. Order that cases be tried together and
34 separate verdicts rendered. Filed May 13, 1909. Cecil Morgan, Deputy Clerk.

To the ruling of the court in passing this order and in consolidating the two causes for trial the defendant, The Prudential Insurance Company of America, then and there duly excepted, which exception was duly noted and allowed by the Court, the exception so presented and allowed being based upon the contention of this defendant that the causes of action were dissimilar, the defendants different companies, the actions based upon different contracts of insurance, and the defenses of the two defendants being dissimilar, and the issues involved in the two causes being dissimilar; and defendant hereby tenders this its bill of exceptions to the Court to sign and seal and the Court does hereby sign and seal the same.

Thereupon the following evidence was introduced by and upon behalf of the plaintiff in the cause:

Policy issued by The Prudential Insurance Company of America upon the life of John Andrew Salgue, dated July 10th, 1905, for the sum of $5,000.00, which policy was as follows:

The Prudential Insurance Company of America.

Age, 42.

Incorporated as a Stock Company by the State of New Jersey.

Whole Life Policy.

Five Year Dividend.

In consideration of the application of this policy, which is hereby made part of this contract, and of the payment in the manner specified of the premium herein stated,

The Prudential Insurance Company of America, hereby insures the life of the person herein designated as the insured, for the amount named herein, payable as specified subject to the privileges and provisions of the second and third pages hereof, which are hereby made part of this contract.

The insured: John Andrew Salgue.

Amount of insurance: Five Thousand Dollars.

35 When payable: Immediately upon acceptance of satisfactory proof of the death of the insured during the continuance of this policy.

Where payable: At the home office of the company in Newark, New Jersey.

Payable to: The executors, administrators or assigns of the insured.

Premium: One hundred, seventy-five and 20/100 Dollars.

How payable: Annually, in exchange for the company's receipt.

When payable: On the delivery of this policy, and on or before the tenth day of July, in every year, during the continuance of this policy.

Where payable: At the home office of the Company, or as provided under the heading "Provisions," on the third page hereof.

In witness whereof, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this policy to be signed by its president, and vice-president, and to be duly attested, this tenth day of July, one thousand nine hundred and five.

JOHN F. DRYDEN,
President.

LESLIE D. WARD,
Vice-President.

Attest:
E. W. PIERSON.

Privileges.

Cash Loan: If this policy be continued in force, the insured may borrow from the company the amount specified in the following table, by making written application for the loans and assigning the policy to the company, as security in accordance with the terms of the company's loan certificate, provided five per cent. interest on the whole amount of said loan be paid annually in advance.

Paid up Life Policy, or Paid up Insurance: If this policy, after being in force three full years shall lapse or become forfeited for the non-payment of any premium on the date when due, as specified on the first page hereof, or of any note given for a premium or loan made in cash, on such policy as security or of any interest on such note or loan, it may be surrendered for a non-participating paid up life policy as specified in the following table; provided the policy be legally surrendered to the company within three months after the date to which premiums have been duly paid. If this policy, having lapsed or become forfeited as above, be not surrendered for a paid up life policy, the company will write in lieu of this policy, and without any action on the part of the insured, a non-participating, paid up term policy for the full amount insured by this policy, such paid up term policy to be dated on the date to which premiums have been duly paid, and to continue in force for the term to be indicated by the following table; provided, that if there be any indebtedness to the company, on account of this policy, the amount of such paid up term policy shall be the face amount of this policy, less the amount of such indebtedness, and the term for which said paid up term policy shall run, shall be changed to that term for which the surrender value of this policy, hereinafter specified after deducting such indebtedness will carry the modified

amount at the single premium term rate of the company. The paid up term policy shall provide, moreover, that in case of the death of the insured, within one year from its date, there shall be deducted from the amount payable by the company, any premium that would have become due on this policy up to the time of death of the insured if the policy had been continued in force. The paid up term policy will be delivered on the legal surrender of this policy.

Or Cash Surrender Value. If this policy be legally surrendered to the company within three months from the end of the third year from its date, or of any year thereafter, and all premiums to the end of that year have been paid in full, the company will pay therefor the sum indicated by the following table, and to this sum will add the full reserve value of any addition existing at the end of that year.

Table Above Referred To.

Age, 42.

37 The cash loans, paid up life policies and cash surrender values stated in the following table, apply to a policy of $1000.00. As this policy is for $1000.00, the cash loan (column 1) the paid up life policy (column 2) or the cash surrender value (column 4) available in any year, will be five times the amount stated in the table below for that year.

At the end of—	Cash loan per $1,000.	Paid-up life policy per $1,000.		Extended insurance for face amount of policy.	Cash surrender value per $1,000.
	1	2		*3	4
1 year	None	None		60 days	None
2 years	None	None		120 days	None
3 "	$32.00	$84.00	3 years	254 days	$35.00
4 "	17.00	118.00	4 "	346 "	50.00
5 "	68.00	156.00	6 "	52 "	73.00
6 "	85.00	187.00	7 "	49 "	91.00
7 "	104.00	219.00	8 "	4 "	110.00
8 "	124.00	251.00	8 "	280 "	131.00
9 "	145.00	283.00	9 "	154 "	153.00
10 "	167.00	315.00	9 "	357 "	177.00
11 "	188.00	346.00	10 "	161 "	198.00
12 "	209.00	378.00	10 "	301 "	220.00
13 "	230.00	409.00	11 "	50 "	243.00
14 "	253.00	440.00	11 "	141 "	266.00
15 "	275.00	471.00	11 "	240 "	290.00
16 "	297.00	496.00	11 "	218 "	313.00
17 "	319.00	521.00	11 "	209 "	336.00
18 "	341.00	544.00	11 "	185 "	359.00
19 "	364.00	568.00	11 "	148 "	383.00
20 "	386.00	589.00	11 "	100 "	407.00

*(See 2nd Par. of Special privileges below).

The benefits stated in the above table apply to the original sum insured only. If the sum be increased by dividends or otherwise, the benefits will be increased, but if any indebtedness to the company placed on the policy will operate to reduce the benefits.

If this policy be continued in force beyond the 20th year, tables of cash loans paid up life policies, extended insurance and cash surrender values as above, after the twentieth year, will be furnished on application to the Home office.

If the premiums on this policy be paid in quarterly or semi-annual installments, due allowance will be made in computing benefits from the above table for that portion of a year's premiums paid over and above the full number of year's premiums indicated.

Special Privileges.

Grace in Payment of Premiums: In the payment of any premium under this policy, except the first, a grace of one month will be allowed during which time the policy will remain in force.

Policy non-forfeitable, after first year's premium has been paid: If this policy, after having been in force one year, shall lapse for non-payment of premiums, the company will continue in force the insurance under the policy for a period of sixty days from the due date of such premium, as specified on the first page hereof; if this policy, after being in force two full years, shall lapse for non-payment of premium, the company will continue in force the insurance under the policy of one hundred and twenty days from the due date of such premium; after the policy has been in force for three or more years, the above privilege "Paid up life policy or extended insurance," will apply.

Revival of Policy: If this policy be lapsed for non-payment of premium, it will be revived any time within two years after the due date of such premium as specified on the first page hereof, upon written application and payment of arrears of premiums with interest at the rate of five per cent per annum, provided evidence of the insurability of the insured, satisfactory to the company be furnished. Application for revival after two years from such date will receive equitable consideration.

Change of Beneficiary: The insured may at any time while this policy be in force, by written notice to the company at its Home office, change the beneficiary or beneficiaries under this policy, such change to take effect only upon endorsement of the same on the policy by the company whereupon all rights of the former beneficiary or beneficiaries shall cease; provided, however, that the insured shall have attained to majority according to the laws of the state in which the insured resides, and that no such change of beneficiary shall be valid of the policy or any interest therein be assigned at the time of such change.

Installment Privilege: The amount insured under this policy is payable in one sum, but may be made payable instead in equal annual installments in any number from two

to twenty-five, or may be made payable to the beneficiary in equal annual installments to continue for twenty years and so long thereafter as the beneficiary shall live; subject to the terms and conditions under the heading "Installment Privileges" on fourth page thereof.

Trust Fund Privilege. At the time this policy becomes payable as a claim the amount insured or any portion thereof not less than $1000 may be left during the lifetime of the beneficiary in trust with the company, and the company will pay thereon, interest at the rate of three per cent. per annum, together with such annual dividend as may be apportioned by the company. The said trust fund shall be paid at the death of beneficiary, but may be withdrawn at any time with accrued interest. The trust fund privilege shall be inoperative if the amount payable under this policy be less than $1000, or if the beneficiary be a corporation or a firm.

Dividends.

This policy is issued on the five year dividend plan, and at the end of each fifth year from its date, if in force, will be credited with a dividend from the surplus apportioned by the company to policies of the same class. Such dividend may be applied, as the insured may elect, to purchase a participating paid-up addition to this policy or to reduce the premiums hereon during the ensuing five years, or may be withdrawn in cash by the insured.

If this policy be continued in force, the insured shall notify the insured in writing, not more than three months after the end of each dividend period, which mode of settlement he selects. Otherwise the company will reserve the right to make the selection.

Provisions.

Payment of Premiums. This policy is based upon the payment of premiums annually in advance, but if premiums be made payable in quarterly semi-annual installments, any future installments of the premium for the current policy year remaining unpaid at the maturity of the policy shall be considered an indebtedness to the company on account of this policy. Premiums are payable at the home office of the company, but may be paid to an agent of the company on or before the dates when due, in exchange for official receipts signed by the president or secretary and countersigned by an authorized agent of the company. If any premium be not paid when due, this policy shall be void and all premiums forfeited to the company except as herein provided.

Indebtedness. Any indebtedness to the company on account of this policy, will be deducted in any payment or payments or in any settlements under this policy.

Modifications, etc. No condition, provision or privilege of this policy can be waived or modified in any case except by an endorsement hereon signed by the president, one of the vice-presidents, the secretary, the actuary or the associate actuary. No agent has power in behalf of the company to make or modify this or any other contract of insurance, to extend the time for paying a premium.

to waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information.

Assignments. If this policy shall be assigned, the assignment must be in writing and the company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at the Home office of the company, and its receipt duly acknowledged. The company will not assume any responsibility for the validity of an assignment.

Suicide. If within one year from the date hereof the insured shall die by suicide—whether sane or insane—or in consequence of his (or her) own criminal action, the liability of the company shall not exceed the amount of the premiums paid on this policy.

Incontestability. This policy shall be incontestable after one year from its date if all due premiums shall have been paid.

Mis-statement of Age. If the age of the insured be mis-stated, the amount payable under this policy shall be adjusted in accordance with the correct age of the insured.

Installment Privilege.

41 Written request specifying the number of installments in which the amount insured under this policy is to be paid or whether the installments are to be continuous, must be made by the insured while this policy is in force; such request may be subsequently withdrawn or the number of installments changed at any time during the continuance of the policy upon notice to the company in writing, such request or subsequent notice to be operative only upon endorsement by the company upon the policy.

The amount of such installments shall be based upon the amount insured under this policy together with any paid-up additions and shall be determined from the tables given below.

The first installments shall be payable at the same time that the original amount would have been payable under this policy, and subsequent installments shall be payable on the succeeding anniversaries thereafter.

Installments from Two to Twenty-five.

Number of Installments,	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of Each Installment per $1,000,	$507	$343	$261	$212	$179	$155	$138	$125	$114	$105	$98	$91	$86	$81	$77	$74	$71	$68	$65	$63	$61	$59	$57	$56

Installments—Continuous.

Age last birthday of Beneficiary at death of Insured.	Under 16	16	17	18	19
Amount of Each Installment per $1,000.	$40	$41	$41	$41	$41

21	22	23	24	25	26	27	28	29	30
$42	$42	$43	$43	$43	$43	$44	$44	$45	$45

32	33	34	35	36	37	38
$46	$46	$47	$47	$48	$48	$49

Age last birthday of Beneficiary at death of Insured.	39	40	41
Amount of Each Installment per $1,000.	$49	$50	$51

42

43	44	45	46	47	48	49	50	51	52
$52	$52	$53	$54	$54	$55	$56	$57	$57	$58

54	55	56	57	58	59	60	61	Over 61
$59	$60	$61	$61	$62	$62	$63	$63	$64

Each installment under this policy, except the first, will be increased by such annual dividend as may be apportioned by the company.

At the time any installment is due, the remaining installments, if any, may be commuted, unless the company shall have been otherwise directed by the insured in writing, at the rate of three per cent. per annum compound interest and the equivalent value withdrawn in one sum; provided, if the installments be continuous, those installments payable to the beneficiary more than twenty years after the maturity of the policy cannot be commuted.

The legal holder hereof at the time the policy becomes a claim shall have the privilege of having the amount insured under the policy payable in installments as herein provided, unless the company shall have been otherwise directed by the insured in writing.

If no one be designated as beneficiary, or if there be more than one beneficiary under this policy, or if the beneficiary be a corporation or a firm, it cannot be made payable in continuous installments.

Proviso.—The installment privilege shall be imperative if the amount payable under this policy be less than $1,000.

Illustration.—A policy under which $5,000 is payable in one sum at death may be made payable in twenty annual installments of $325 each ($65 per $1,000), or if the beneficiary be 35 years of age at the death of the insured, the policy may be made payable

in annual installments of $235 each ($47 per $1,000), to continue for twenty years at least and as long thereafter as the beneficiary shall live. If the beneficiary die before twenty installments be paid, the remaining installments will be paid to the executors, administrators or assigns of the beneficiary.

NEWARK, N. J., ——, 190–.

Received from the Prudential Insurance Company of
43 America — dollars, in full for all claims under the within policy terminated by —— ——.

Witness—

—— ——.

—— ——.

Number 674,931.

The Prudential Insurance Co. of America.
Home Office, Newark, N. J.

Insurance on the Life of John A. Salgue.

Amount, $5000.
Date, July 10th, 1905.
Annual Premium, $175.20.

The plaintiff then introduced policy of the Aetna Life Insurance Company on the life John Andrew Salgue, dated July 15th, 1906, of six thousand ($6,000.00) dollars, which policy was as follows:

No. 65,192. $6000.

4566.

Aetna Life Insurance Company of Hartford, Connecticut.

This policy of insurance, witnesseth: That the Aetna Life Insurance Company, in consideration of the statements, answers and warranties contained in or endorsed upon the application for this policy, which application is copied hereon and made a part of this contract, and in further consideration of the annual premium of one hundred and sixty-nine dollars and forty-four cents to be paid to it at or before five o'clock P. M., of the fifteenth day of July in each and every year during the continuance of this policy, hereby insures the life of John A. Salgue, hereinafter called the insured of Macon, County of Bibb, State of Georgia, in the sum of six thousand dollars, payable at the Home office of said company in Hartford, Conn., on the surrender and discharge of this policy either at the end of the policy years falling nearest to age eighty-
44 five, if the insured is then living, or on receipt and approval of proof of the death of the said insured during the continuance of this policy, and any indebtedness to said company on account of

this policy or any premium for the current year remaining unpaid shall first be deducted therefrom.

The said sum insured shall be payable as a death claim to his executors, administrators or assigns. The said sum insured becoming due during the life time of the insured, also the cash surrender value hereinafter described, shall be payable to him.

The beneficiary above designated may be changed at any time during the continuance of this policy, provided the policy is not then assigned and is then returned to said company with a request for such change, legally executed by the insured on a form to be furnished by said company for that purpose.

After one year from the date hereof, all matured premiums having been paid as herein required, and the age correctly stated in the application, this policy shall be indisputable except for army or naval service without a permit.

This policy is issued and accepted subject to the conditions, provisions and benefits printed on the reverse of this page, which are hereby referred to and made a part hereof.

In witness whereof, the said Aetna Life Insurance Company has by its president and secretary (or Asst Secretary), signed and executed this contract in the City of Hartford and State of Connecticut, this fifteenth day of July, 1895.

W. G. BURKELEY, *President*
C. E. COLLINS, *Secretary*.

Non-Participating Life.

Conditions, provisions and benefits which are made a part of the within policy:

Premium Payments.

Grace in Payment of Premiums.

SECTION 1. This policy shall not take effect until the first premium hereon shall have been actually paid during the life-time and good health of the insured and within sixth (sixty) days from the date hereof, a receipt for which payment shall be the delivery of this policy. If any subsequent premium be not paid when due, then this policy shall cease and determine subject to the non-forfeiting features hereinafter described, except that a grace of thirty days, during which time the policy remains in full force, will be allowed for the payment of any premium, after the first; provided that with the payment of such premium, interest is also paid thereon for the days of grace taken, but for any reckoning hereinafter named the time when a premium becomes due shall be the day stipulated therefor on the first page hereof. No premium shall be considered paid unless a receipt shall be given therefor, signed by an executive officer of said company, and if any obligation given in payment or part payment of any premium is not paid when due, this policy shall then cease and be treated as if no such obligation had been given.

Conditions Applicable During the First Year Only.

SECTION 2. If the insured shall, within one year from the date hereof, commit suicide, while sane or insane, or be or become intemperate, or shall at any time within said year travel or reside north of the 69th degree of north latitude, then *and* each and every of the foregoing cases this policy shall be null and void.

Service in Army or Navy.

SECTION 3. If the insured shall at any time be engaged in army or naval service without a permit therefor, signed by an executive officer of said company, then this policy shall be null and void, but after one year from the date hereof and before such service is entered upon, a permit therefor will be granted, if requested, in consideration of an extra premium of not exceeding two and one-half per cent. of the sum insured, payable annually in advance.

Extension of Full Sum Insured.

SECTION 4. If default occurs in the payment of any premium under this policy after the premiums have been paid for three years or more, this policy shall then cease as to the right to pay further premiums, but shall, if there is no indebtedness to said company against it, be extended as temporary life insurance for the full sum hereby insured during the time specified in the following table, reckoned from the time when the first unpaid premium became due, at the expiration of which time it shall wholly cease and be void, except for the endowment value, if any, shown by the next column of
10 said table payable only at the expiration of the endowment term if the insured is then living. Should the death of the insured occur within three years after the time when the first unpaid premium fell due, and while this policy is in force as temporary life insurance, there shall be deducted from the amount otherwise due from said company the premium that would have been paid had there been no default in the payment of premium with interest thereon.

Paid-up Policy. Cash Surrender Value.

In lieu of such extended insurance, a paid-up non-participating stock policy will be issued for the amount shown by the following table, or, at the expiration of the fifth or of any subsequent policy-year said company will pay the amount of cash shown by the following table, provided in either case that this policy be surrendered to said company and a written application made for said paid-up policy or cash value within three months after the time when the first unpaid premiums became due. Said paid-up policy shall bear the date of its issue and be due and payable in event of death as herein provided, or, at the expiration of as many years from its date as there are years of this endowment term less the number of full years expired under this policy.

Loan.

SECTION 5. After the expiration of three years from the date of this policy, and before default in the payment of premium, said company will loan upon the same the amount shown by the following table.

Assignments.

SECTION 6. A duplicate of any assignment of this policy shall be filed with said company; but in no case does said company guarantee the validity of an assignment; and any claim against said company arising under this policy, made by an assignee, shall be subject to proof of interest.

All Agreements Must be Signed by an Officer.

SECTION 7. All agreements made by said company are signed by one of its executive officers. No agent or other person not an executive officer can alter or waive any of the conditions of this
47 policy, or make any agreement binding upon said company.

Not Entitled to Dividend.

SECTION 8. This policy shall not be entitled to share in the surplus earnings of said company.

Directions Concerning the Use of the Table.

The figures given in the table are for one thousand dollars of insurance and the values for insurance of a greater or less amount can be calculated therefrom. The table is based on the assumption that there is no indebtedness against the policy, and that all the premiums have been paid to the end of the policy year for which the value is given.

If there is any indebtedness to the company against the policy, the loan or the cash surrender value will be reduced by the amount of said indebtedness and the amount which shall be extended as temporary life insurance (also the endowment value, if any), or the amount of paid-up policy to be issued will be reduced in the proportion which said indebtedness bears to the cash surrender value hereof. For a loan or cash surrender value the policy must be unincumbered by the interest of minor children and a valid loan note or surrender papers must first be executed under such regulations as are prescribed by the company. In determining the extension, the paid-up policy, the cash or loan value, premiums paid for entire years only will be considered.

Table of Values per $1000.00 of Insurance. Issued at Age of 42.

Non-participating Life,
(End't at 85.)

At end of year.	Extended Insurance. Yrs.	Days.	Endowment Value.	Paid-up Policy.	Loan	Cash Value.
3	1	181	No endowment value in addition to these extensions.	$61	$14	..
4	3	2		102	31	..
5	4	138		140	47	$52
6	5	226		179	64	71
7	6	259		215	82	91
8	7	245		252	98	109
9	8	174		285	116	129
10	9	64		319	135	150
11	9	276		352	153	170
12	10	76		383	172	191
13	10	210		413	192	213
14	10	312		443	210	233
15	11	28		472	230	256
16	11	79		500	249	277
17	11	115		526	270	300
18	11	129		552	290	322
19	11	130		576	310	345
20	11	120		600	330	367
25	10	238		702	427	474
30	9	239		784	521	579

Values for later years not shown in this table will be calculated on the basis as those given.

Plaintiff introduced copy of the application for insurance attached to the policy, and which was dated July 8th, 1905, which is as follows:

Copy of the Application.

Executive Officers:
President.
Vice-President.
Secretary.
Ass't Secretary.

Being desirous of insuring my life with the Aetna Life Insurance Company, I do hereby declare and warrant that I am in good health, mind and body and mind, and that the following statements signed by me are full, correct and true; and that I have no knowledge or information of any disease, infirmity or circumstance not stated in this application which may render insurance on my life more hazard-

ous than if such disease, infirmity or circumstance had never existed, and I do hereby agree that the declarations and warranties herein made, and the answers to the following questions, together with those signed by me on the second page of this application, shall be the basis and form part of the contract (or policy) between me and the said company, and that if the same be in any respect untrue, said policy shall be void; and I further agree that the insurance hereby applied for shall not be binding upon said company, until a policy has been issued, nor until the amount of premium as stated
49 herein has been received by said company, or its authorized agent, during my lifetime and good health, and a receipt given therefor, signed by an executive officer of said company; and I further agree that no statement or declaration made to any agent, examiner or any other person, and not contained in this application, shall be taken or considered as having been made to, or brought to the notice or knowledge of, said company, or as charging it with any liability by reason thereof; and I understand that all policies and agreements made by the said Aetna Life Insurance Company are signed by one or more of its executive officers, and that no other person can grant insurance or make any agreement binding upon said company.

Questions and Answers Above Referred To.

1. What is your name? Give Christian name in full and plainly written.

John Andrew Salgue.

2. What is your present occupation or employment? If more than one, state all. (If a clerk, salesman, manufacturer, mechanic or laborer, state what class of goods sold, manufactured or handled.

Supt. Brick Works.

3. Have you any intention of changing your occupation?

No.

4. What employments have you been heretofore engaged in?

Same as above.

5. Where do you reside.

Street and number:	Town	County:	State:
	Macon.	Bibb.	Ga.
What is your business address:	"	"	"

6. What kind of policy is desired?

Ordinary Life. Non-parte.

7. What amount of insurance is desired?

$6000. Premium, $169.44.

8. What is the name, residence, relationship of the person to whom the sum insured shall be payable if it becomes due
50 by reason of your death? (If not a near relative, state what interest the proposed beneficiary has in your life.)

My estate.

NOTE: Unless otherwise requested herein, policies for the benefit of near relatives becoming payable by reason of death of the insured

will be written payable equally to such beneficiaries as may survive the insured, and the remaining installments equally to such beneficiaries as may be living when an installment falls due, and in event of the death of all, the remaining installments, if any, to the executors, administrators or assigns of the last surviving beneficiary. Policies becoming *payment* as endowments will be written payable to person whose life is insured.

9. What is the place and date of your birth? (Be sure to answer correctly.)

Place, Gallipolis, Ohio; Year, 1863; Month, 28th day October.

10. What is your age next birthday? Be particular to answer correctly.

42.

11. Are you married?

Yes.

12. Are you or have you been connected with the manufacture of malt or spirituous liquors? If so, when and how?

No.

13. Have you been, or are you now, employed in the army or navy?

No.

14. What are the names and residences of all the physicians whom you have personally employed or consulted during the last five years?

Dr. James T. Ross, Macon, Ga.

15. What is the name and residence of an intimate friend?

John T. Moore.

16. Has any proposal or application to insure your life been made to any company, association or agent on which a policy of insurance is now pending? Or has any such proposal or application ever been made for which insurance has not been issued, or on which a policy or certificate of insurance was not issued in full amount, and of the same kind as applied for? If so, give particulars, and the names of all such companies, associations or agents.

None.

17. What amounts are now insured on your life, and in what companies or associations? If insured in this company, state the number and amount of each and every policy.

$2000, Prudential.

$2000, Mutual Life.

18. Has any company or association in which your life has ever been insured, or the agent thereof, expressed an opinion that the risk was undesirable, or refused to reinstate any such insurance after it had lapsed? If so, state particulars and the names of all such companies, associations or agents.

No.

19. Has any physician expressed an unfavorable opinion upon your life with reference to life insurance?

No.

Dated at Macon, Ga., this 8th day of July, 1905.
Applicant must sign here JOHN ANDREW SALGUE.
(Write Christian name in full.)

In presence of—
B. H. RAY.
W. E. HAWKINS.

Page 2 of applications.

Answers Given to Examining Physician.

20. What is your name? (Give Christian name in full.)
John Andrew Salgue.

21. Have you ever had any of the following diseases? Answer Yes or No opposite each. If yes, state the date, duration and severity of illness.

	Appendicitis.	No.
	Asthma.	No.
52	Bronchitis (Chronic).	No.
	Consumption.	No.
	Disease of the heart.	No.
	Dropsy.	No.
	Fits.	No.
	Fistula.	No.
	Gall Stone.	No.
	Gravel.	No.
	Habitual headache.	No.
	Hip joint disease.	No.
	Liver Complaint.	No.
	Neuralgia.	No.
	St. Vitus Dance.	No.
	Spitting of blood.	No.
	Syphilis.	No.
	Tumors.	No.
	Ulcers.	No.
	Venereal Disease.	Gonorrhœa.

22. Have you had inflammatory rheumatism; if so, *and* how often?
Slight sub-acute attack seven years ago. No return.

23. Are you subject to dyspepsia, dysentery or diarrhœa?
No.

24. Have you had during the last seven years any disease or severe sickness? If so, state the particulars of each case and the names of the attending physicians.
No.

25. Have you either gained or lost in weight during the past five years? If so, give particulars.
Not varied in 15 years.

26. Has either of your parents or any of your brothers, sisters, uncles, aunts or grandparents been afflicted with rheumatism, insanity, or with pulmonary, scrofulous or any hereditary disease?

No, except one sister, consumption.
(If so, answer "no, except," following by stating each and every case separately.)

27	Family record. Age.	Living. Health.	Age.	Dead. Cause of death.	How long sick.
Father.	57			DK	DK
Father's father.	DK			DK	DK
53					
Father's mother.	"				
Mother.	42			DK	DK
Mother's father.	90			Submersion	
Mother's mother.	80			Old age	DK
				"	DK

Brothers.	Age.	Living: Health.	Dead: Age.	Cause of death:	How long sick:
			21.	Boiler explosion.	Few hours.
			26.	R. R. Accident.	Killed Instantly.
Sisters.	28.	Good health.	32.	Acute Phthisis.	3 months.

28. Have you ever been intemperate in the use of either malt or spirituous liquors, or used any drug habitually?
No.

29. Do you use either malt or spirituous liquors daily or nearly every day? If so, what is used and the approximate amount?
No.

30. Have you ever taken any cure or treatment for any habit? If so, what and when?
No.

Additional Questions to Be Answered when Applicant is a Woman.

31. Are you married or single? 32. How long married? 33. Number of labors. 34. Date of last labor. 35. Were labors normal? 36. Have you miscarried, and from what cause? 37. Are you now pregnant? 38. Is your menstruation regular and normal? Is there any organic disease of uterus or appendages, or is any corrected?

39. Are there any tumors in the breasts or any other part of the body?

Dated at Macon, Ga., this 8th day of July, 1905.

(Applicant must sign here.)
JOHN A. SALGUE.
(Write the Christian name in full.)

The medical examiner must sign here as a witness to the signature of the applicant:

In presence of:
CHARLES C. HARROLD,
Examining Physician.

54 It was admitted that the death of John A. Salgue, the insured, occurred at the time and as alleged in the petition of plaintiff. It was also admitted that John T. Moore was the duly appointed administrator of John A. Salgue. It was also admitted that due proofs of loss had been made to the Aetna Life Insurance Company and to The Prudential Insurance Company upon said policies of insurance, and that both defendant companies refused payment. The Prudential tendered back its premium of $210. This closed the evidence for the plaintiff.

Thereupon the following evidence was introduced by and upon behalf of the defendants in this cause:

C. M. ADAMS, sworn for the defendants, testified as follows:

Direct examination

By Mr. BLACK:

My name is C. M. Adams; I live in Macon; I am manager of the Prudential Insurance Company. Yes, sir; I was connected with the Prudential Insurance Company on July 6th, 1905. I have represented that company since July, 1900, here in Macon. Yes, sir, I took this application on the life of John Andrew Salgue. Yes, sir; I am the agent who wrote it. Yes, sir; Mr. Salgue signed that in my presence. Yes, sir; I witnessed his signature. Yes, sir; that was on July 6th, 1905. Yes, sir; I asked those questions on that application of Mr. Salgue, and wrote these, his answers. Yes, sir; Mr. Salgue answered "No" to Question 4-B in the application, which is as follows: "Has any company or association ever declined to grant insurance on your life, or issue you a policy of a different kind, or for a sum less than that applied for? Answer yes or no." To question 4-D of the application, which is as follows: "Is any other application for insurance on your life pending at this time in another company; if so, give the name of the company?" He answered: "Yes, Provident Savings Life." I went to the office of the Bibb Brick Company, out in South Macon here, Mr. Moore's office, to write Mr. Salgue this insurance. As to why I happened to go there, Mr. Moore passed me on the street one day, up in front of my office, and asked me to go out there; he said I could write Mr. Salgue a policy. As to whether I knew of it, Mr. Moore asked me to

55 go out to his office and see Mr. Salgue; said he wanted some more insurance, and if I would go out there, I could write it. That was Mr. John T. Moore, the plaintiff in this case. Yes, sir; I went to his Brick Company, and wrote Mr. Salgue. That policy was delivered to Mr. Salgue at Mr. Moore's office. As to what happened at that time, when I went out with the policy, Mr. Salgue stated that he had gotten in some other insurance, and he did not know whether he could afford to take my policy or not. I remarked it was a little peculiar, and contended for my policy; I did not know there was anything like that coming up, and Mr. Moore remarked: "You take the policy, and I will pay for it," and Mr. Moore gave me his check for the premium and accepted the policy.

Cross-examination.

By Mr. O. J. WIMBERLY:

I am manager now for the Prudential Insurance Company of America. At that time I was its general agent, over quite a large territory. Yes, sir; I had charge of that territory. No, sir; I was not the only representative they had in that territory. Yes, sir; I was the only representative they had, except those who worked under me. Yes, sir; I had entire charge of everything for that company in that territory. Yes, sir; he only gave me the name of the policy as being pending when I originally wrote the application, the Provident Savings. When I went to deliver the policy, he told me about one policy that he had given a note for to another agent when the application was taken, which he did not know he had signed a note, and said they had the note, and he would have to pay the note. I think that was the Aetna. As to whether I stated to the jury that when I got out there I found he did not want to take the policy, because he had gotten a lot of other insurance I did not know anything about, he stated he had taken this particular policy in the Aetna, and had given a note at the same time. I don't remember that he mentioned any other notes at all, except that Aetna policy. As to whether I remember that he wanted to back out of taking this because he had enough other insurance, he remarked that he did not know whether he could afford to pay the premiums for so much insurance; that he would be compelled to pay that note he had signed for the other. Yes, sir, after he told me that he had so much insurance, he did not know whether he would be able to pay the premiums, I, as general agent, still delivered
56 him this policy. No, sir; I made no objection, and asked him no questions as to what other insurance he had. As to whether I insisted on his taking the policy when he wanted to back out, I think I insisted that he pay the premium. No, sir; I did not insist so much that I finally made a rebate from the premium in order for him to take it. No, sir; I did not know [knock] off my commission, or a part of it. I don't remember that I knocked off enough to bring the premium down to about $144; the policy calling for $175. As to whether the amount Mr. Moore paid me was the amount I took, I only remember that I took Mr. Moore's check; I don't know whether it was for the full premium or not; my recollection is it was. As to whether I was so anxious to write this insurance that I wrote him two policies, so as to give him his choice of whichever one he would take, whether I didn't have another policy, too, I am not clear on that. I don't remember that; I don't know whether I brought out the extra policy or not. I don't think I had a participating and a non-participating policy. The participating policy is the more expensive. My recollection is he took the non-participating. Yes, sir; I can tell by looking at it. This is a participating policy. The difference is, one has a dividend; one premium is a little higher. As to which one he applied for, the dividend policy has the premium loaded for the dividend; it has a larger premium than the non-participating policy; I don't know how to

express it; it has a larger premium, and under the larger premium, you will get a dividend at stated times, annually, or as the contract calls for. As to whether the actual cost is the same in the long run, it is supposed to be about the same thing. The Prudential Insurance Company, I will state, now have adopted one form only, and only write non-participating insurance. This application was for a five year tontine policy. The application was for a participating policy. As to whether the application was for the policy he actually got, or a different kind, it is an application for the policy he actually got. Yes, sir; this was the more expensive kind of policy, and the one I made the most commission out of. As to whether I remember whether or not he applied for a cheaper policy, and I gave him his choice, but he finally took the more expensive; I remember he applied for his policy, and this policy was delivered under the contract; there is his signature to the application. Mr. John T. Moore was present when this application was taken, and perhaps some one else in the office; I don't remember who. I think Mr. John T. Moore filled out that application; that is my recollection, he and I standing at the desk, and Mr. Moore wrote those
57 answers. Mr. Salgue was standing by the desk answering those questions. No, sir; those answers are not in the handwriting of Mr. John T. Moore; I wrote this whole thing. Yes, sir; I was mistaken about Mr Moore; I thought Mr. Moore filled it out. As to whether I want to correct my answer about there being two policies, and I tried to get him to take the higher priced kind if I could, I wrote this letter to the company, and begged them to send me an extra policy, non-participating. I don't remember whether they sent it or not; this is the one delivered. Yes, sir, I remember that I asked them to send me two policies on the life of this man; I did not ask for two policies to be delivered, but two to be selected from, one of the two to be selected. No, sir it is not a fact that Mr. Salgue informed me at the time he applied for this policy that there were a number of different agents that were trying to write his life, and he wanted me and all of us to get our policies, and he would select between them, and that he wanted an aggregate of ten thousand dollars insurance. He did not tell me that, that I remember. No, sir; it is not a fact that he told me he wanted about this amount of insurance and that I was in a great rush to get it there because I knew there were a number of other agents trying to write him. I was told he wanted about six thousand dollars in insurance; perhaps he had four thousand dollars and wanted six more to make it ten; I understood it that way. Yes, sir; I understood he wanted but ten thousand dollars insurance. No, sir; it is not a fact that Mr. Salgue told me I could write the policy, and he would let the others write, and he would select the one he liked best after we got it; I don't recollect any conversation like that. As to why I wrote to the company to write two policies and see which one he preferred, if he was not to select after they all came, I guess I had heard about this other insurance that was being brought out; I knew they were figuring on a non-participating basis, and had ordered a six thousand dollar policy to defeat my five thousand dollar participating

policy, and I sat down and wrote the company on the 8th, after this examination went in, to send me a non-participating policy, that I might compete with these non-participating contracts. As to whether I did know that I was competing with other insurance companies, and wrote so I would have the choicest stuff in order to compete with them, I found out on the 8th. Yes, sir; I informed the company of that fact before I delivered this policy to Salgue. As to whether I got a non-participating policy, and took them both out there to Salgue to give him his choice, I don't remember [illegible] the extra policy ever came or not. Yes, sir; this is a [illegible] I wrote and mailed to the company, and which they [illegible] before the policy was delivered, but I don't think that that [illegible] ever issued, that second policy there asked for; I don't think it ever came out; I don't think the policy I wrote for a non-participation policy was ever issued. I don't remember that I told Mr. John A. Salgue, in the presence of Mr. John T. Moore, that I had the other policy in my office, and if he wanted it I would go and get it, but I would give him this high-priced policy and charge him the same premium as the other. As to whether it is true that when I went out there the first time and wrote the insurance, Mr. Salgue told me in Mr. John T. Moore's presence and hearing that he wanted but ten thousand dollars insurance altogether, and that if I was willing to write it that way, he would let me do it, and when I got mine, he would compare the different policies, and if mine was as good as the others, he would take mine, I don't remember any such conversation; I have a great many transactions of insurance, and I don't remember that. No, sir, he did not tell me on that occasion that he had applications pending in other companies, and might not take it; if he had, it would have appeared in the application. No, sir; he did not tell me in the presence of Mr. Moore words to the effect that he had not been rejected, but he started to make application to another company, the Penn Mutual, and that he had withdrawn the application. No, sir; I did not know anything about that Penn Mutual at that time. As to what it was I said, exactly, about attempting to get or having gotten other insurance when I went out to the Brick Yard to get the premium, and what it was he said, Mr. Salgue, when I went to deliver the policy, said he had applied in the Aetna for a policy, and at the time he had applied for it the agent had taken a promissory note from him which he did not know he had signed, he did not know he was signing, and he would be compelled to pay that note. No, sir; he did not speak of any other notes, at all. As to whether I mean to limit my testimony now, in saying that he had applied for other insurance, to his statement that he had only obtained insurance from the Aetna, at the time I delivered the policy, I understood that he had accepted the Aetna's policies, which had gotten in ahead of mine, or he had signed a note for it, and would have to accept it when it came. Mr. Moore insisted on his taking my policy, and gave me a check for it. I do not recall that anything definite was said about any other insurance in any company except the Aetna. I do not

59 remember any definite statement that he had obtained other insurance in other companies. No, when I wrote the company to send both kinds and I would try to get him to take the participating: "I will have him sign an application for a non-participating, but I will do my best to deliver the participating policy; please be as prompt as possible in sending it, otherwise I am afraid I will lose the business," it was not because I had heard a number of insurance people were about to write him; that was because I had heard the Aetna had written him a non-participating policy for six thousand dollars to deliver against my participating policy. If you will allow me to explain, there are two classes of people my company won't deliver non-participating policies to, laboring men and men who have hazardous work; in that case, I don't know whether they would deliver a non-participating policy or not.

Redirect examination.

By Mr. BLACK:

As to whether, in that letter which has been shown to me, attached to the application, in which I ordered out the extra policy, that was the usual or unusual thing, it is very common; I do it very often; I very often order a man two kinds to select from; unless I can satisfy the man perfectly when he places his application. I sometimes order another policy of a different kind. A man may be undecided as to what kind of policy he wants, and I frequently order out two kinds on the same application, and deliver one or the other, and return one or the other.

By Mr. WIMBERLY:

As to whether, where a man is in doubt as to whether he will take some insurance in mine or another company, I will order out the same kind as the other company orders out, so, if he is over-persuaded by the other people, I can furnish that same kind of insurance, I do order the same kind of policy; I did not order this extra policy with a view to selling him more than five thousand dollars, but so as to give him choice of the two kinds, choice with another company.

By Mr. BLACK:

Yes, sir; the other company was the Aetna.

60 Dr. W. R. WINCHESTER, sworn for the defendants, testified as follows:

Direct examination.

By Mr. BLACK:

Yes, sir; I am the medical examiner for the Prudential in Macon. I suppose I have been such medical examiner twelve or fifteen years, I don't remember. Yes, sir; I made this examination (referring to paper exhibited by counsel, purporting to be the medical examina-

tion of John A. Salgue). Yes, sir; I asked him the questions contained in that medical examination. I recorded the answers just as he gave them. Question Thirteen of the medical examination reads: "Has your application for insurance ever been rejected, postponed or modified by an insurance company, assessment order or benevolent order?" In reply to that, he said: "No. Policy now pending with the Provident Savings." Questions Sixteen and Seventeen of the medical examination, and the answers made to them by Mr. Salgue, are as follows: "Are you in good health?" "Yes, sir." "When were you last attended by a physician?" "Early spring, 1905, bilious fever for two days." Question 23 is a general question, for a good many troubles; among them is one: "Have you ever had palpitation of the heart?" He said: "No." "Dyspepsia?" "No." Yes, sir; he signed that medical examination. As to whether I knew, at the time I examined Mr. Salgue, that he had applied for insurance elsewhere, I knew he had an old policy in a company I examined for. Yes, sir; an old policy with the Prudential; I had examined him for a policy in 1902, March 26th. I did not know whether he had any application pending at that time in any other company, except the Provident Savings, which is stated in that report. No, sir; I did not know that he had been examined by Dr. Little for insurance in the Penn Mutual. No, sir; I knew nothing about that. No, sir; I did not know that he had been examined for the Sun Life at that time. No, sir; I did not know that he had been treated by Dr. McAfee for chronic acid gastritis. No, sir; I did not know that he had been treated by Dr. McAfee for heart trouble. No, sir; he did not inform me in reference to any of these matters I have just been asked about, nothing except that little bilious attack he said there some time prior; it is in the report; I have to go by that; it was four years ago; I don't remember. I don't remember how long I have been the examiner for the Prudential Insurance Company, twelve or fifteen 61 years. Yes, sir; I suppose I am examiner for two or three dozen other companies. I have been examining for all of them for several years. A mitral murmur is a murmur due to organic trouble with the valves of the heart. As to the effect it would have on the heart and on a man's life, on his insurance life, the man himself might not know he had it until it became very far advanced, but no medical examiner would recommend a risk where he discovered a mitral murmur. As to what my recommendation would have been if I had known this man had a mitral murmur, I would not have recommended the risk; I would have classed him as a poor risk. Dyspepsia is a very general term. Chronic acid gastritis is an affection of the stomach where the digestion of the food is involved; chronic means of long standing, and the acid means an acid condition of the stomach. No, sir; there is no difference between chronic gastritis and chronic acid gastritis, except in one you find an acid condition of the stomach, and in the other you would not. Chronic gastritis, or dyspepsia, is the popular name for it. As to what would have been my recommendation in reference to that risk, if I had known that Mr. Salgue had had chronic acid gastritis from January

up to the date of my examination, a period of practically six months, and had been repeatedly treated by Dr. McAfee for that, and during that time his stomach had been repeatedly washed out by Dr. McAfee, I would have recommended that it be postponed, as it is a curable disease. Yes, sir; I would have recommended that it be postponed until he was well, or recovered from his gastritis. I would not have recommended him to the company, if I had known that it was pending at the time. As to whether I would or would not have approved him if I had known he had a mitral murmur of the heart, I would have reported him as a poor risk if I had known that.

Cross-examination.

By Mr. WIMBERLY

As to whether I would have found it, if he had a mitral murmur a mitral murmur is sometimes very hard to find. As to whether I examined him very carefully, I examined him; I suppose I examined him carefully; it was a second examination; I don't know that I examined him as much as the first. No, sir; I didn't find it. The only way to find it is by sound. Yes, sir; that was the examination I made. No, sir; a patient himself don't know he has it. The only way it is discovered that he has a mitral murmur is by the
62 physician who makes the examination listening and hearing it. Yes, sir; I have for the last twelve or fifteen years or twenty years made a specialty of careful examinations of people's insurance risks. Yes, sir; I stated that I examine for some two or three dozen insurance companies. I don't know whether I examine for most of them that do business in Macon; I suppose I do, not all of them. I can recall probably half a dozen life insurance companies that do business in Macon, besides the two or three dozen that I examine for; there may be others. Yes, sir; I try to be very careful. Yes, sir; I try to be exceedingly careful in listening for anything of that sort. I didn't find any mitral murmur. As to whether with the care I use on a policy of that size, I would have found it if it had been there, it would have depended on my hearing; you have to hear it; in many cases, you even have to stop the patient from breathing, and then you have to get over the exact spot; a few inches one way or the other, you would not hear the sound. Yes, sir; I have a very good hearing. Ordinarily, I feel sure he has not got a heart trouble of that sort. No, sir; there was nothing in either of my examinations of this man to indicate that he had a mitral murmur. No, sir; there wasn't anything in the appearance of the man to indicate it. Yes, sir; a heart trouble of any length or standing will affect a man's appearance in time. Some of the symptoms are shortness of breath, and liable to have a cough. No, sir; he did not have any of those symptoms. No, sir; it does not affect his countenance in any way, in the earlier stages. No, sir; it does not affect the man's physical vigor until the later stages. As to whether it does in the later stages in many cases where those symptoms follow, a good many symptoms can follow it. Yes, sir; when any one else examines a party, I still make my own examination, and use my own judgment. As to

whether, when I speak of a man being rejected, that means rejected by the company, it is only the company who is competent to reject. No, sir; it is not very frequent, after a physician examines a man, that the man is notified that he might perhaps do better to withdraw his application before it is passed on at all, and that he very frequently withdraws his application, so as not to be rejected; the companies I examine for require the report to be sent in.

63 Dr. W. R. WINCHESTER, recalled for the defendants, testified:

Cross-examination:

By Mr. WIMBERLY:

Yes, sir; gastritis is very often a temporary condition. Yes, sir; it is a matter that usually yields to treatment. When it does, it may leave no permanent effect on the health. As to whether it has any connection with any heart trouble, stomach troubles can follow heart troubles. Usually they do not. No, sir; heart trouble, if it existed, which was so slight that a trained medical examiner could not find traces of it, would not ordinarily cause gastritis. Yes, sir; gastritis may follow many diseases. Yes, sir; it may be caused by imprudence in eating or drinking, too. As to whether there are any objective symptoms of gastritis, besides the subjective, there are symptoms that a doctor can see that lead up to it. No, sir; I did not discover any of those symptoms at the time that I examined Mr. Salgue for insurance. Yes, sir; my recollection is that I made a very careful examination. Yes, sir; I always do when I have to. As to whether, in my opinion as a medical examiner, Mr. Salgue had any organic affection of the heart at the time I made the examination, I did not discover any. I don't think he had; by my examination alone, I would say he had no heart trouble. At the time, I did not discover any gastritis, and my questions did not elicit any. As to my opinion as to whether or not he had chronic acid gastritis at the time I made the examination, as a medical expert, who has examined a great many risks, I did not find any, and I don't think he had any. Yes, sir; if he had had any, on such a serious examination, I think I would have discovered it. As to whether, if there had been any abnormal enlargement of the heart, I would have discovered it, there might have been some enlargement that would have escaped my examination. If there had been any large enlargement, I think I would have discovered it. Yes, sir; in examining a case, even where I don't know that he has been examined or turned down by any other doctor, I make a thorough examination. As to whether my examination would have been about the same, if I had known of his rejection, if I had known he had been rejected on account of heart trouble, I would have put him through certain exercises, as the heart trouble probably when he was quiet would not have shown up. Yes, sir; I would make such examination as would determine the presence of heart trouble. Yes, sir; in a great majority of cases it would.

64 Redirect examination.

By Mr. BLACK:

The object of the exercises I would have put him through would have been to make sounds that would not have been made when he was quiet. Yes, sir; I mean heart sounds. I don't remember the weight of the average heart. I could not say about how big it is; it has been a long time since I had any anatomy on that line. I have forgotten certain lines. It is about 3½ inches or 4½ inches each way; I really don't remember. I didn't say that gastritis was always temporary; I suppose it is *at* times. As to whether I would say that chronic gastritis was temporary, it may have a limit; it doesn't follow indefinitely. After gastritis has lasted for some months, it is classed as chronic and acute. As to whether the word "chronic" takes it out of the temporary stage, it means it has existed for some time. The heart and the stomach are just a few inches apart; the diaphragm separates the thorax from the abdomen, the heart, which is above it, and the stomach, which is below it. Yes, sir; the stomach depends for proper performance on the proper condition of the blood; it has got to be fed from the heart. As to whether, if the heart is affected, and the stomach thereby is not properly fed with blood, it performs its functions properly, it would depend upon the extent of the heart trouble; every function would be impaired by a very serious heart trouble. As to whether it would be relatively impaired by stomach trouble, heart trouble might be so light that it would not affect the stomach perceptibly.

By Judge MILLER:

As to whether, at the time of this examination, my office and Doctor Little's were on the same floor in the same building, I don't know whether Doctor Little had left at that time or not. It was about that time that he left. No, sir; Mr. Salgue did not tell me when he came to see me that another doctor had told him something was the matter with his heart, that he had heart trouble. No, sir; nothing of that sort was said. As to whether that was the only occasion upon which I examined Mr. Salgue, or was consulted medically about him, I examined him in 1902. As to whether that was the only policy he was examined about, I don't think I ever saw him except on those two occasions, when I examined him. Yes, sir; they were both for the same company. No, sir; on the latter occasion, he never mentioned about any

65 other doctor examining him; never said anything at all, except that he said he had had a bilious attack, the previous fall, I think it was, a slight bilious attack, which passed off in just a day or two. As to whether that was the one Doctor Ross treated, I don't think he stated; it was a trivial matter; I regarded it as trivial, and he so stated. Yes, sir; it is very possible that I could examine the same man, say at an interval of two months, and at one time the heart trouble sometimes would escape me, and at another it would not. Yes, sir; it is owing to circumstances, and the man's condition at the time. As to whether gastritis may result from bilious attacks, I don't know whether I can say what a bilious at-

tack is. When people say they are bilious, usually it is some little stomach derangement. As to whether gastritis can result from bilious attacks that result from great stomach derangement, most people regard bilious attacks as stomach attacks. What we regard as bilious attacks are connected with the stomach and the portal system, and in some cases there is an enlargement of the liver, but it — more likely to be stomach trouble, and in the neighborhood of the stomach. No, sir; doctors do not generally use the expression that a man has a bilious attack or biliary disease, without defining the disease with precision, except to satisfy the patient. It is generally regarded biliousness is a slight derangement. Yes, sir; a very large part of a doctor's duty is to satisfy his patient, if he has patience enough to listen to him.

By Mr. BLACK:

As to whether bilious attack is supposed ordinarily to concern something the matter with the liver, the name might imply that, but the liver is not always involved. As to whether the gall bladder is concerned in bilious attacks, that is bilious colic.

Recross-examination.

By Mr. WIMBERLY:

Yes, sir; Mr. Salgue appeared to be in perfect health; yes, sir; a very vigorous man; erect, and muscular also. Yes, sir; he had every appearance of a man in perfect health. Yes, sir; he would be regarded as a first-class risk. No, sir; if a man should die of heart disease within some ten months after he was examined by me for this mitral murmur, his symptoms would not necessarily have been such that I would not have accepted him; sometimes they are very rapid in progress, and sometimes very slow. Yes, sir; generally speaking, they last a good deal longer than that.

66 Redirect-examination.

By Judge MILLER.

Yes, sir; this man had the appearance of being a vigorous, robust, healthy man. Yes, sir; that is entirely consistent with a man having heart disease in its first stage.

ANDERSON CLARK, sworn for the defendants, testified:

Direct examination.

By Mr. BLACK:

My name is Anderson Clark. I live in Macon. I have been in the insurance business for eight or nine years. Yes, sir; I was in the insurance business in June and July, 1905. In June, 1905, I was with the Penn Mutual; Mr. Hoge had the agency in Macon at that time. Yes, sir; I was local agent in Macon for the Penn Mutual Insurance Company of Philadelphia. Yes, sir; I wrote an application for Mr. John A. Salgue for the Penn Mutual,

I think it was in June; what time in June I cannot say. Yes, sir; it was prior to his application to the Sun Life Insurance Company I should say it was five or six days prior to that application. Yes, sir; I took a regular application from Mr. Salgue for the Penn Mutual. He applied for six thousand dollars. He signed the application; yes, sir. When that application was taken, I was in the office of the Bibb Brick Company. Mr. Salgue was superintendent of the Bibb Brick Company. Yes, sir; I think Mr. Moore is president of that. As to how it happened that I wrote Mr. Salgue this application, I had been talking insurance, explaining a certain other policy, a cheap form, to Mr. Moore, and Mr. Salgue was sitting in the office, and once when Mr. Moore went out, he and I got into conversation about that form of policy. Yes, sir; that is the way it started. Mr Salgue wanted five thousand dollars at that time; in fact, when it was first mentioned between us, I fixed the amount; I fixed it at five thousand. As to how I reached five thousand, I don't know; it is just customary, if you write him more than one, to write five or ten. As to why that amount was increased to six thousand dollars, he told me when I was making out his application, that he already had four thousand in force; I persuaded him to make it six, just to make it ten thousand; I just wanted as much as I could get. As to when I went to Doctor Little, he had just been

67 appointed; it was his first examination for the Penn Mutual. As to what happened there, I took the application to Dr. Little, and told him to telephone to Mr. Salgue; he telephoned, I suppose, and made the appointment with him; possibly the next day, or the next, Mr. Salgue went to Dr. Little to be examined. No, sir; I did not go with him to the office. I think it was the next day after that that I saw Dr. Little. Dr. Little told me he could not pass him, didn't think he could pass him, because of a heart trouble. As to whether anything else passed between myself and Dr. Little at that time, I was very much surprised when he told me he didn't think he could pass him, because Salgue was a man of such splendid physique, it was very much a surprise. As to whether I communicated that to Mr. Salgue, I think Dr. Little saw him again; that is my recollection of it, when he told me positively he could not pass him. Yes, sir; Dr. Little told me. Then I wrote a note to Salgue, and gave it to an agent who was in an adjoining office, representing the Sun Life of Canada. As to the contents of that note, as well as I remember it, it was substantially a letter of introduction to Salgue for this Mr. Nowell of the Sun Life, and in there I told Mr. Salgue that I would advise him to make application with this company, as it seemed the Penn Mutual could not issue him a policy on Dr. Little's examination, that I didn't think Dr. Little would pass him; that was about what it was. The next time I saw Mr. Salgue was several days later, possibly four or five days, maybe more than that. No, that was not before the application was made to the Sun Life; that was four or five days afterwards, I should say. As to the conversation that occurred between myself and Mr. Salgue at that time in reference to this insurance, I told him that, under Dr. Little's statement in regard to him, I did not think he could get a policy with the Penn Mutual, and that I would hold his examina-

tion up, and would not make a record of it, and if he could pay the doctor's fee to the Penn Mutual—because that is customary entirely with agents to stop examinations that way—I would pay his fee, and he could answer in the future that he had never been rejected by any company. Yes, sir; he paid me the five dollars, and I paid it to Dr. Little. I don't know what became of the application itself. it was a mast [past] matter with me, and I never kept a record of that sort of thing. No, sir; I haven't got it.

Cross-examination.

By Mr. WIMBERLY:

Yes, sir. I wrote this in the letter to the agent of the Sun
68 Life, and explained the facts to him. Yes, sir; he understood that Dr. Little would not pass him, by my turning it over to him. As to the Sun Life issuing him two policies after I turned him over to them, the way that arose, the application was made for three thousand dollars; I saw it when Nowell brought it back well, as he had made application to be [me] for six thousand. I knew that six thousand could be delivered to him, so I just told him to order out three thousand more. Yes, sir; I introduced Mr. Nowell. Yes, sir; in that way, the Sun Life issued six thousand dollars. As to whether that was more than Mr. Salgue wanted, and he never took some of those policies, in the one I showed him, which was a very cheap form, he wanted six thousand, but when a higher priced form was shown him that the Sun Life took his application for, he only wanted three thousand of it. I don't know how long it was after the Sun Life issued this policy before he took out the second policy. No, sir; it wasn't some months; it was just a few days; that is, the first policy. I only know about the first policy. Yes, sir; I stated to him that I would withdraw the application to the Penn Mutual before it reached the company, and then he could truthfully state that he had not been rejected by any other company. As to whether I explained that to him, I don't know that I went into it at length, but that was the substance of it, that he could withdraw the application, as he had the right to do, before it went on to the company, and he could state he had not been rejected. Yes, sir; I am an insurance agent. We had this particular conversation at the Bibb Brick Company, when I went to get Dr. Little's fee. I had been an insurance agent, writing insurance about eight or nine years. As to whether I have been very active in that time, writing a good deal of insurance, I was doing more then than now. No, I have not written a good deal of insurance, but a fair amount in the last few years. Yes, sir; I have represented a number of companies at various times. Yes, sir; it is a usual thing with agents, when a man is not reported on favorably, to advise him to withdraw his application, and not make a report to the company. No, sir; I was not present when Mr. B. H. Ray tried to get Mr. Salgue to accept the Aetna policy. I knew of Mr. Ray going out there to try to get him to accept it, just as I knew that the other agents were after him there in regard to their policies. I never saw Mr. Ray there. Yes, sir; I knew that Mr. Salgue wanted some in-

surance, from my conversation with Mr. Salgue when he went to
pay me the fee, and then afterwards when I went out with the
69 agent of the Sun Life to deliver the policy. Yes, I know
when we went out there, we had difficulty to get him to take
the insurance, because he had been overburdened with insurance.
As to whether he wrote the application to the Penn Mutual the first
time, or I went out there several times, I got that right away. The
Sun Life agent made two or three visits before he wrote his appli-
cation. As to it being generally known during that time that he
had applied for insurance, I could only judge so from what I came
across; the Sun Life agent went out there several times to deliver
this policy, and he could not do it. He couldn't deliver it because
he would not take it, for some reason or other. I only knew that
from what this agent would tell me when he would come back from
there. He would tell me he was going to deliver the policy. Then
he would come back and say Salgue would not take it. As to what
Mr. Nowell did report when he came back, as I remember it, there
was some objection as to the age. I am not perfectly clear on that,
but there was some objection. The policy, I think, was written at
the age of forty-one, as well as I remember, and there was some mis-
statement as to his age, and what he was entitled to from the date of
his birth: he was entitled to the age of forty, instead of forty-one.
A policy of that age was given. In the meantime he had the age
corrected, but I forget now how that was passed over. Yes, sir; one
objection in the Sun policy was, he was entitled to it a little cheaper
than on that policy. Later, I went out to see him with Mr. Newell.
I made three or four trips to deliver the Sun Life policy. As to
what Mr. Salgue said about this matter when I went in person about
it, he liked another policy that had come out with the Provident
Savings, better than the policy with the Sun Life. I explained the
difference to him after several trips; I persuaded him that the Sun
Life policy was a better policy. Yes, sir; when I went in person with
Nowell, I found some reluctance to take the policy, for this reason:
he had made application for several different policies, agreeing to
take one; he did not care for but six thousand, or a small amount,
and he wanted to take the one that he liked the best; when I got
there with the Sun Life, he liked the Provident Savings. I am
testifying from my own knowledge in this way: When I tried to
deliver this policy, he told me that these policies were ordered out
under that condition, and he had to wait until the different policies
were ordered out, until he could tell definitely what he would do.
There was a special plan of the Provident Savings, known as a
twenty year savings policy, with a half return premium. I
persuaded him that the policy with the Sun Life, being what
70 we call a non-participating policy, was a better contract as for
six thousand than the Provident Savings for five; the next
time he ordered out another policy from the Provident Savings, the
agent had ordered it out trying to get something like the one I had.
As to whether I did, during those visits, persuade him to take the
Sun Life policy, I did not get delivery then. Yes, sir; I tried to
persuade him, because, when I saw he would not take the Provident

Savings, and would take the Sun Life in preference, he hesitated, because he had a policy coming to him from the Aetna, that was his idea, to take the one he liked best of these; in other words, he applied for more insurance than he wanted to take, because he wanted to see others before he was willing to commit himself. When I went to collect the fee from him, it was mentioned, he had made application to some other company. I forget what company it was. I told him that it would be better for him to have applications pending with different companies, then possibly, if he should happen to be rejected in any other company, it would be as I explained to him. It was just the insurance companies' nature to be largely in a hurry to issue insurance, if they knew it was pending in another company, and would just take a man on his own risk. Yes, I wanted to make the insurance companies anxious by a good large amount, and let them judge him on his risk just as it appeared to them. I made three or four trips before I got him fairly persuaded to take the Sun Life policy. Yes, sir; I know of a difficulty growing out of the fact of his having signed a note for a policy, and they wouldn't give him the note back, as I said just now. When the Provident Savings Company was disposed of, I wanted to know what kind of policy would be taken by the Aetna. Yes, sir; I persuaded him not to take the Provident Savings, but to take the Sun Life. Yes, sir; he did take the Sun Life, and declined to take the Provident Life. As to the Aetna Life, it came about in this way; I wanted to find out what sort of a policy the Aetna was issuing; Mr. Salgue did not know, and he said possibly it was on a memorandum they gave him when they took his application. I asked him if they gave him some memorandum when they took his policy; he said yes. I said: "Well, then, you have settled for the Aetna policy." I mean by that, he had given a note, and they had given him a binding receipt. As to what he did when he learned that, he didn't understand it, and he was rather mad about it; he thought that policy was coming out under the same conditions as the other policies. As to what Mr. Salgue said, he told me that he understood the
71 policy was to come out and he was to accept it or not, as he saw fit, but the binding receipt said otherwise, and he was mad. I know he was mad. Yes, sir; I saw that he was mad. Yes, sir; that was the first time he learned it, when I explained it to him.

Redirect examination.

By Judge MILLER:

As to whether Mr. Nowell was the Sun Life agent, he didn't hold the General Agent's contract here; Mr. Holland was the agent in the adjoining office to me. Yes, sir; Mr. Nowell was writing insurance for the Sun Life. No; I was not undertaking to write for the Sun Life in that particular instance; I just turned the matter over to him, and told him to write this policy, he could if he wished, and give me one-half of his commission. Yes; I get one-half commission. Yes, sir; I went out there those three or four times seeking to finally land that insurance. Yes, sir; the real contest during the first interviews

was between the Sun Life and the Provident; the Provident's agent's policy was the first one that came. In that way, I came across it. As to whether I finally persuaded Salgue that the Sun Life policy was better than the Provident, later he took three thousand of each; I could not deliver him the whole six. As to whether I afterwards insured him for six, I only delivered him three thousand; I understand three thousand was delivered to him later. I don't know, no. The particular time I was talking to Salgue about the Aetna matter was on about the third or fourth trip of mine there for the delivery of the Sun Life policy. Yes; I think the fourth trip was the last one. Yes sir; Salgue just said he had a memorandum, that the agents of the Aetna had given him; he spoke of it as a memorandum of some sort. Yes, sir; he showed it to me. No, sir; I haven't got that paper; I haven't seen it since. Yes; as I remember, it was a binding receipt, giving a receipt for a note that was given in settlement of a premium on the policy, as I remember it, putting the insurance in force from the date of his application, or from the date of his acceptance with the Company; I don't remember how the receipt read. Yes, sir; it was provided the Company finally accepted the risk.

72 Dr. J. LITTLE, sworn for the defendants, testified as follows:

Direct examination.

By Mr. BLACK:

My name is William J. Little. Yes, sir; I live in Macon. I graduated in medicine in 1894. Yes, sir; I was the Penn Mutual examiner in Macon in June, 1905. Yes, sir; I recall the circumstances of Mr. Salgue coming to my office, or being brought to my office, in reference to an examination to be made by me for the Penn Mutual Insurance Company. As to what happened, Salgue appeared at my office for the purpose of being examined in the Penn Mutual; I asked him a certain number of questions that are found on the blank, and noted his robustness and apparent good health; and on making what is known as the physical examination, which comprises a part of the examination of an applicant, I noticed that his heart was acting in a tumultuous manner, that is, in its pulsations, showed what would be termed as heaving up and down, might be termed heaving heart. It showed that it was a little to the right of the normal position, a position that is under the nipple, which would indicate an enlarged heart. I then listened to the sounds of his heart, and heard the sounds differing from those in health, that is, a murmur, which showed more clearly at the apex of the heart. That is about this way (indicating) from the heart side. And it was transmitted back and through under the shoulder blade. This sounded here more distinctly at the apex of the heart, and transmitted through the chest to the shoulder blade, or scapula, as it is called, would indicate a disease of the heart known as a mitral murmur. On discovering this sound, I was satisfied that I would not pass Mr. Salgue, and I

ld him that I found some trouble that would probably prevent his
tting insurance. I asked him who his doctor was. He told me
at Dr. McAfee was his physician, and wanted to know of me what
s trouble was. I was not examining him for the purpose of treat-
g him or prescribing, and I ascertained his physician, who at-
nded him. I found his heart affected, and directed him to Dr.
cAfee. I saw Mr. Clark, who was the representative of the Penn
utual, and in this particular Company my duty was to report to
m, to the agent giving me the application, as to what I found. I
formed him I could not pass him. Mr. Clark showed a good deal
of feeling about the matter when I told him I would not pass
him. He asked me if I would see the man again. I told
him I would not object to examining him again, but told him
condition was that of heart trouble, and it was no use. My im-
ssion is, the man came. As to what was the matter with Mr.
lgue's heart, he had an organic enlargement of the mitral valve
the heart, with, at the time I saw him, what is known as a com-
nsatory hypertrophy; that is, the heart was enlarged, the muscles
re strengthened and enlarged by reason of the extra work put upon
o overcome this extra work in the valve. This enlargement is
at we term hypertrophy, in order to overcome the deficiency in
valve. At the time, there were no heart symptoms that the appli-
t was aware of, which he showed. There was talk of a second
t; in that, I am not absolutely clear whether he came back a sec-
d time, or not. Yes, sir; it was my duty to report back to Mr.
rk as Agent, the result of the examination. Chronic acid gas-
is is a condition of the stomach in which there is an increased
ount of acids poured out into the stomach, due either to a genera
of hydrochloric acid itself, or it may be an acid condition due to
mentation of food products in the process of digestion. As to
ther the amount of blood that goes to the stomach has anything
do with stomach trouble of that character, stomach trouble of
character would be due more largely, at the stage I saw him, in
opinion, to the affection of the stomach, rather than the blood
dly. The nervous system would control it more than the blood
dly. As to whether this mitral murmur is more pronounced at
tain days, or certain times of the day or night, literature states
there are times when mitral murmur disappears and cannot be
; it is taught in medicine that sometimes a mitral murmur is not
d, is not caught. As to whether a mitral murmur is more or
distinct after labor, or after a period of rest, the heart sounds are
distinct after exertion; they are clearer, and the heart is made
t with more vigor and strength, which accentuates the sounds
the heart makes in performing its functions. As to the condi-
of a man's health, who has a mitral murmur, his health may be,
has what is known as thorough compensation, relatively good,
e would speak of it, perfect, so far as outside observation goes,
he time I examined him, I considered Mr. Salgue in perfect
h until after I made an examination of him. After I examined
I considered that he had an anatomical defect. That is rela-
serious illness. A man may have a mitral murmur, and go

through life, and reach his expectancy. On the other hand,
74 an accident may occur to the valve which is affected, the little artery that acts as a guide in its support may break, or something may occur about that valve that is affected; he may lose compensation, and dilation occur, which would cause loss of health, and even death.

Dr. W. J. LITTLE, recalled, testified as follows:

Cross-examination.

By Mr. WIMBERLY:

It was in the month of June that I examined Mr. Salgue; the exact date I could not give. Mr. Anderson Clark brought the application. No, sir; I did not send the examination to the Company, after I had made it. As to whether I made a report, or whether it was withdrawn from my hands, I made a report to Mr. Clark, that I would not pass him. Yes, sir; they withdrew the report. As to whether I ever made a written report, I never finished out the examination papers at all. Yes, sir; Mr. Clark, who put it into my hands, withdrew it from my hands. As to whether, so far as I know, there was no rejection by the Company, I suppose the Company rejected him when I made my report to Mr. Clark. I did what I was instructed to do; I reported to Mr. Clark; that was the end of it to me. Of course, when I report, the Company does the accepting or rejecting. When I make my report, unless it is withdrawn from my hands, the home office passes on it. Yes, sir; they do the accepting or rejecting. Yes, sir; when I examined him there was an enlarged heart. I detected that by a physical examination, by knowing the position of the heart in its normal state, and seeing the relative position in this man's chest, and by being acquainted with the normal heart action, and by hearing the difference in that man's heart. Yes, sir; I detected it through the physical objective symptoms by which I can detect an enlarged heart. Yes, sir; that is a permanent condition. Yes, sir; any examination that was carefully made by a physician ought to detect that enlarged heart. Yes, sir; it is a thing that is discoverable by a physician. As to whether it is a thing the patient himself would know anything about, he might not know anything about it if it gave no symptoms. As to whether there was anything to indicate it was painful, or that the patient himself would know, the examination of this man, up to the point of my dis-
75 covery of the heart lesion, was negative, so far as he was concerned. No, sir; there was nothing to indicate that he would know that he was a diseased man, so far as I could determine. As to whether he appeared to be a very healthy man, he was vigorous, strong and muscular, and apparently a good risk. As to whether anyone other than a physician would regard him as a man unusually healthy and vigorous just to look at him, he would be looked upon on the street as probably above the average of health. As to whether I told him he had heart disease, I told him his heart was affected; I ascertained as physician, and directed him to his

doctor to let him know what his trouble was. No, sir; I did not go to the doctor myself; I directed him to his physician. Yes, sir; I know Dr. Harrold, and Dr. Barron and Dr. Gostin and Dr. Winchester. They are reputable physicians in Macon. As to whether I noticed any symptom of trouble, except this enlarged heart and the symptoms I testified to referring to the heart, the symptoms I noticed were entirely physical; I mean they were not symptoms; they were signs. Yes, sir; they were the signs I detailed yesterday. No, sir; I noticed no other disease or trouble than that.

By Judge MILLER:

Yes, sir; I informed Salgue that I could not pass him, that his heart was affected; that was about the language I used. Yes, sir; I told him I could not pass him for insurance on that account. Yes, sir; after I satisfied myself of the condition of his heart I stopped the examination at that point.

By Mr. WIMBERLY:

I reported the result to Mr. Clark, who was the agent for that purpose. Yes, sir; he withdrew the papers from my hands.

By the COURT:

As to whether I went into any explanation of the general effect of this disease, or this defect in the heart action, or organic condition of the applicant, to the applicant, I was acting in the capacity of insurance examiner, and as such, I did nothing further than to tell him his heart was affected, and to recommend to him that he consult his family physician. No, sir; I did not give him any details as to the disease, further than simply to tell him his heart was affected.

Dr. J. C. MCAFEE, sworn for the defendants, testified as follows:

Direct examination.

By Mr. BLACK

My name is J. C. McAfee. Yes, sir; I live in Macon. I have been practicing medicine eleven years. Yes, sir; I recall that in June, 1905, or early in July, 1905, Mr. John A. Salgue came to me with reference to trouble that he might have. As to what occurred between Mr. Salgue and myself at that time, he came into my office, and said that he had just been told by Dr. Little that he had trouble with his heart, and that Dr. Little had told him to come and see me about it, and he was there for the purpose of finding out whether or not it was true. Yes, sir; I made an examination of him at the time. I found that he had an organic heart disease, a disease of a valve of his heart, called the mitral valve, and that his heart was doing good work at that time, that the enlargement or thickening of the heart muscle was sufficient to overcome the defect at that time. Yes, sir; I did discover a mitral murmur. Yes, sir; I had been Mr. Salgue's physician prior to that time, for several months. Yes, sir; I have

a record of the times of my treatment of him. Yes, sir; I have with me. As to when I treated him, and what I treated him fo I have here my daily note book (referring to memorandum); I kep a record of my work at that time. Mr. Salgue was at my office o the following days: January 5, 1905; January 9, 10, 11, 13, 15, 1 1905, and I went to his house on the 20th of January 1905. also went to his house on the 22d of January, 1905. And he wa at my office on March 29, 30, 31, April 1, 3, 5, 7, 10, 12, 14, 1 1906, on April 18, 20, 22, 24, 26, 28, 1905; on May 2, 4, 8, 9, 11, 1 15, 17, 19, 21, 24, 26, 29; and on June 1, 5, 7, 13 and 15; and on Jul 1, 3 and 13, 1905. Yes, sir; those were professional visits. I wa treating him for a stomach trouble he had. The stomach trouble wa what we call a chronic gastritis. As to whether that is a form o dyspepsia, or not, dyspepsia means difficult or painful digestion that is the meaning of the word. Yes, sir; dyspepsia embraces this During that period, I gave him medicines, washed out his stomach from time to time, and used electricity on him. As to whether that treatment modified or aggravated the symptoms, in his par ticular case, he improved sufficiently to stick to me for that length of time. The liquid with which I washed out his stomach
77 was water and mild solutions of bicarbonate of soda and mild saline solutions. As to what part I applied the electricity to, I applied one part of the current to the spinal column back of his neck, and the other part over his stomach, and I used an extra electrod, one that is put down into the stomach. No, sir; I don't recall the day of the month that Mr. Salgue came to my office after leaving Dr. Little's office; it was in June, though, prior to the 19th of June. I know that because I went away from the city on the 19th of June, and did not come back until the last of July. I treated him for that heart trouble once; he was at my office on the 1st, 3d and 13th of July; it was on one of those days, but I can't recall which one.

Questions.

By Judge MILLER.

Yes, sir; when he came to my office direct from Doctor Little's, that was some time prior to the 19th of June. Yes, sir; I took Mr. Salgue's statement for the fact that he had come to me direct from Little. He stated to me that Dr. Little had said he had heart trouble. Yes, sir; I thereupon examined him, made a physical examination. I did not strip him to the skin; I examined him through his shirt, my recollection is that I did not have him take off anything but his coat, I don't remember that he had an undershirt. He had a splendid appearance, physically. When I had completed the physical examination, and found that he had an organic affection of the heart, my diagnosis of the condition was that it was what we call a mitral regurgitation of the heart. As to the normal course of that disease, a disease of the mitral valve is always said to be an inflammatory condition of that valve, and this very inflammation destroys a certain portion of the edge of the valve that makes it impossible for the valve to completely close the opening of the heart that that

valve is intended to close. Then, on the contraction of the heart, when the valve attempts to close this opening, it comes up to the normal condition, but this edge of the valve being partially destroyed, it again leaves this open. A certain amount of blood passes back to the upper chamber of the heart. This condition is usually overcome by an enlargement of the heart muscle, a thickening of the heart muscle that Nature brings about in order to correct as far as possible this condition. When that is done—it is a thing that takes place promptly—the patient is not aware that there is any trouble here, because Nature has corrected it for him.

78 He will not be aware of it until he has either a recurrence of the original inflammatory condition in the valve—that comes first, does not suffer until that occurs again, and increases the defect to the extent that this enlargement is not able to correct. Then the patient gets tired easily, troubled with shortness of breath, has a certain amount of swelling, his feet, fingers and hand, sometimes in his hand, from the lack of force of the circulation to drive the blood through. This takes place as the repeated return of those conditions affects the valve of the heart. If he has no return of those conditions, he may go for a lifetime, and never know he had the heart trouble. Another thing that tends to produce an aggravation of this trouble is physical exertion, physical straining in hard work, or running, or anything that would call on him for very hard physical exercise. That would call for vigorous circulation, that the heart, being crippled, would be unable to cope with, and that oftentimes results in greater dilation of the heart's cavity. This muscle, being worked down, dilates, and that is usually the termination of the case. A beginning of dilation is what we always call a beginning of the end of that patient; when he reaches the stage of dilatation that is the beginning of the end with him; dilatation is something we cannot overcome. Yes, sir; that is the usual course of the condition that I found him suffering from. Yes, sir; I have examined for life insurance. I have practiced medicine for eleven years. Yes, sir; all this has been in Macon. I have had considerable experience in examining for life insurance; I have been examining for life insurance companies for eight years, and have examined for a good many leading companies in that length of time. I have examined for a majority of them, I think, that have done business here. Yes, sir; I am familiar with the rules and requirements of examining for life insurance. No, sir; I did not tell Mr. Salgue that he was non-insurance; he did not ask me. No, sir; I could not recommend Mr. Salgue for insurance after my examination of him, on the occasion that he came to me from Dr. Little's office.

Direct examination.

By Judge MILLER.

Chronic gastritis of the stomach is a disease of the stomach. No, sir; I did not treat him for acute gastritis; it was chronic gastritis.

79 As to the effect that has on a man's life, it is not a disease that has a fatal tendency; it is one that is very annoying to the patient almost daily, and sometimes hourly; he has pains,

or distress, or unpleasant feelings in his stomach that keep him always annoyed and worried, and more or less incapacitated for his work. As to whether or not a man is a fit subject for insurance while suffering and still not cured, and under treatment for chronic gastritis, I do not consider that it would disqualify the applicant for insurance. This stomach condition that he had, the kind of condition that Salgue had, is one in which the patient might be said to have had too much digestion; he had a sufficient amount of acid and other secretion in his stomach after each meal to digest that meal, and had a quantity left over; this gas was the thing that was bothering him; that was what burned his stomach and kept him constantly in discomfort. As to whether that would be cured by eating a little more, that is a very frequent remedy, but that does not stop the secretion; it stops it for the time, but it does not keep it from coming back after the next meal. I do not think that condition of his stomach had any connection at all with his heart trouble. When I treated him for heart trouble, was on the three last visits he made to my office; I cannot remember the exact one; it was possibly the 3d or the 13th of July; I don't know which. As to how I came to treat him for heart trouble then, he was having some trouble with it. The first time he came to see me, I found this heart trouble; I did not prescribe for him; his heart was doing its work perfectly, and he did not need any medicine, and I told him at that time that whenever in the future he did have certain symptoms, to come on that would require the assistance of medical remedies, to come back and let me treat him. He came back on those three days, and it was on one or the other of those dates I considered he needed medicine, and I prescribed for his heart, from his statement of the symptoms. As to what I would say was the trouble with his heart, he was getting tired a little too quickly, he didn't have the lasting qualities, you might say, he could not hold out as well as he wanted to, and as well as he had been accustomed to, and suffering with shortness of breath on exertion. Yes, sir; the symptoms he described, which led up to my treatment, were such as naturally resulted from his heart condition.

Cross-examination.

By Mr. WIMBERLY:

80 Yes, sir; at the time he came to me, I found a disease of the mitral valves. The mitral valve is the valve that closes the opening between the upper and lower chamber of the heart, whenever the heart undergoes a contraction the closing of it is to keep the blood from flowing backward so that the impulse of the heart muscle contraction can be given to the blood current to send it forward. I did not find any symptom indicating the presence of this disease, except that I could hear the backward flow of the blood on every contraction. No, sir; I had no difficulty at all in hearing that. Yes, sir; I consider that any physician that examined him would have heard it, certainly at the time that I examined him. Yes, sir; the shortness of breathing that I spoke of, and difficulty in getting tired, is always present in the last stages

of heart trouble. Yes, sir; I think any competent physician ought to tell whether there is heart trouble or not, when it reaches that stage. If he makes an examination as he ought to make it when he comes to the point where the application calls upon the physician to relate these symptoms, it is inexcusable in a physician not to find it. As to whether gastritis being chronic or not depends very largely on how soon the man that treats it is successful, it usually has reference to the length of time, rather than to the severity of the disease. As to whether, if a physician were to relieve the gastritis in a week, and another physician were to relieve the same gastritis in a year, in the first case we call it acute and in the other treatment we call it chronic, I don't know that I can say that. I will tell you what acute gastritis is, if you wish; it is a form of gastritis that usually follows on acute indigestion; it is a thing of short duration. Yes, sir; chronic just means that it has lasted some time. As to whether my method of treatment, when I find chronic acid gastritis in a case of a man that has too much digestion, in order to weaken the digestion I pour a lot of water in his stomach, that is not the object; it is to tone up the stomach. As to whether that was my treatment, to fill him up with water, whether that is what we call washing it out, I filled him up with water and let the water run out immediately. As to whether I swore that unless we weakened down the acid he would have eaten himself up, he had too much digestion and unless he had more food the acids were likely to eat out his stomach, it wasn't so bad as that; it would burn him for a while, until the stomach either passed it on into the bowels, or he would do it with drinking water. Water and electricity were the two things I used; I do not consider that the only thing. As to whether this washing out because of too much digestion is usual treatment, or just
81 certain members of the medical profession make a profession of the water treatment, I don't consider it water treatment; we simply wash out the stomach, and it is one of the methods of stimulation to the stomach muscle; it is what is called a massage of the stomach muscles. Yes, sir; there are certain physicians who make a specialty of that particular method of treating gastritis; that is one of the methods they employ. Yes, sir; I belong to that school. That is what we call the regular; the allopathic is the name; we claim the right to use anything and everything by which we can do the patient good. No, sir; it is not a fact that with very much of this washing out of a man's stomach he would get a little tired after his work, and have a little shortness of breath; it only takes a minute or two — wash it out. As to whether, in throwing a lot of water into a man's stomach, the stomach is weakened, Salgue would frequently talk to me while I was washing out his stomach, it disturbed him so little. The discharge comes back through the tube; the tube is passed into the stomach, and the water is thrown through the tube. Yes, sir; the tube goes through the mouth, and then it comes back through the mouth. No, sir; I did not keep up the electrical treatment all of those months for the gastritis; used it from time to time. As to what I mean by from time to time, I can give you the dates on which I used it, if you like; I will state that the chronic acid gastritis is sometimes classed under another

head, neurosis, that is, it seems to be due to a disturbed nervous affection of the stomach, that may also affect other functions of the body, and the use of electricity is for two reasons, one is to correct this disturbed nervous condition, and another is by the use of another kind of electricity known as galvanic electricity, to actually destroy a certain number of these acid secreting spells, that is the galvanic current, and the static current is used more to correct any depressed nervous condition which might be present. As to whether he was a very nervous, neurotic man, he was not what I considered a nervous man; he was anything but a phlegmatic individual; he was a man that was intent about anything that he was concerned in. As to whether he was a type of patient, that while he appeared to have pretty good health, he needed electricity and water, one of the things that caused him to have this trouble with his stomach was his use of tobacco. As to whether I stopped the use of tobacco, or let him swallow the tobacco and wash it out, it was not due to swallowing tobacco. As to whether he would talk to me while I was washing him out, I would not be absolute about that, it is such a common condition. As to whether this very
82 choice stuff was coming back through his mouth while we were talking, it was just some secretion that was left after that; there was no food; it was a liquid; the water coming back would be acid. Yes, sir; when food is dissolved, it is a liquid, too. As to what sort of intelligence a tube has that enables it to distinguish between gases that are acid and bring the gases back without bringing the digested food back, it has no intelligence at all. As to whether it all comes back together, whenever there is any food in his stomach, it comes back, if the particles are not too large for the tube. No, sir; during January, during these treatments, I did not prescribe that he could not take any food into his stomach. As to why he had to be treated oftener during the months of April and May than earlier, whether there was anything peculiar about my treatment that made him come back oftener the longer he took it, on January 20th, he got sick with the grippe, he was at home, and I made two trips to the house. From January 20th and 22d, to April 1st, he was not having much trouble. Yes, sir; when he started back to me in March, then his visits got frequent. Yes, sir; from January 5th to January 22d, I treated him, and then he got sick. No, sir; my treatment of him during January didn't have anything to do with his getting sick. As to whether all this washing out of the stomach, and the enfeeblement it leaves, very often leads to either grippe or pneumonia, it don't enfeeble the patient to wash him out. Yes, sir; when he got down with the grippe, I attended him for the grippe. Yes, sir; the two trips I was at the house were for grippe. As to whether, after he got well of the grippe, he had any heart trouble, he was lying around then for a while, staying about home; he was getting better, and he took a severe cold down there on a cold, wet day. As to whether, during that time he had another physician, whether he had Doctor Ross for his bilfious attack, I did not know it; I saw him on January 22d, on January 22d I visited him at his house; then, on January 26th, a date that I did not call out a while

ago, he was at my office, and I prescribed for him on that day. No, sir; I did not wash his stomach out when he left in July. As to whether he had any stomach trouble, so far as I know, after July, to his death, I don't remember to have seen him any more in a professional way. Yes, sir; when I last saw him, he was still suffering more or less from his stomach. As to whether, during all the time I gave him the electrical treatment, I ever found any heart trouble until Salgue called it to my attention, I did not suspect any,
83 and did not examine him for it. Yes, sir; if a person has heart trouble, sometimes it has something to do with this neurosis I spoke of. As to whether I would consider Salgue a neurotic patient, I did not say he had neurosis; I said chronic acid gastritis was sometimes classed as neurosis. Yes, sir; Salgue came to me himself, and told me Dr. Little had seen him and sent him there. No, sir; I had not seen Doctor Little. No, sir; I never did see Doctor Little about that. Yes, sir, Salgue came himself.

Redirect examination.

By Judge MILLER:

Yes, sir; upon the day Mr. Salgue came from Dr. Little's office to me, and told me Little said his heart was affected, I immediately examined his heart. As to whether I told him, after I had completed the examination, that he had a serious heart affection, I told him that his heart was wrong; I told him what the trouble was.

By Mr. WIMBERLY:

I told him the trouble was, he had a disease of the mitral valve. No, sir; that was not all I told him; I gave him directions, what he ought to do, and what he ought not to do. I did not prescribe anything, except to give him some advice as to how to conduct himself. When I prescribed for him in July, I prescribed a combination of drugs, but the two active drugs were digitalis and strophanthus. Strophanthus is a heart stimulant. Digitalis is also a heart stimulant, strengthens the contraction of the heart. The effect of strychnine is to stimulate the activity of the heart muscle.

Dr. JAMES T. ROSS, sworn for the defendants, testified as follows:

Direct examination.

By Mr. BLACK:

I live in Macon. Yes, sir; I knew Mr. J. A. Salgue. I treated him on one or two occasions. Yes, sir; I am a physician; I have been practicing since April 20, 1885. As to when I treated Mr. Salgue, I don't remember the dates; it seems to me it was the latter part of 1904, or the early part of 1905, I treated him on one occasion. As to what I treated him for, I think he
84 had had a severe chill, and his liver was torpid and his bowels constipated. Yes, sir; that is what you might describe as bilfious fever. That was in the latter part of 1904 or the early part

of 1905, I think. Yes, sir; he consulted with me again. As to when that was, I don't remember the dates. As to whether it was shortly after this time I treated him, or before that time, the first time I remember to have treated him at all, I didn't treat him then; the next time he consulted me must have been very shortly after he had been examined for life insurance by Dr. Little and seen by Dr. McAfee. The only thing that makes me refer to that as the time soon after that examination had been made, was because he stated to me that he had been examined for life insurance, and the physician had said he would not pass him because he had a heart trouble, and he wanted me to listen at his heart and tell him whether I thought, after listening to it, that I myself would be willing to examine him with others, and give him a testimonial as to the fact that his heart was all right, and that he would be entitled to life insurance. I examined him; I did not strip him, because, when I put my ear on his chest I could without any trouble detect that he had a heart trouble, and in my opinion it was a mitral regurgitant murmur, and I stated to him, while I was sorry to have to say it to him, that in my opinion the doctor had acted correctly in saying he would not pass him for life insurance.

Cross-examination.

By Mr. WIMBERLY:

As to whether he told me who the physician was, I think he mentioned both names, Little and McAfee. No, sir; I have no dependent way of fixing it, other than that the doctor would not pass him for life insurance, and he wanted me to examine him. As to whether he told me that Dr. Little had examined him and said he had heart trouble, and Dr. Winchester had examined him and said he did not have it, I don't remember that he mentioned Dr. Winchester in the case, at all; I won't swear he did not. I don't recollect it at all. As to whether I remember his mentioning Dr. McAfee, I think he mentioned both of those names, that he had been examined for life insurance; he didn't say whether both examined him for life insurance, or not, but both told him he had heart trouble. No, sir; I cannot fix the date when I examined him, except, as I say, it must have been very near the time the examination was made, because he referred to the fact that these men
85 had just said he was not a fit subject for life insurance. No, sir; I made no record. No, sir; I was not afterwards paid my bill for it. No; Mr. Moore did not pay me for it; he paid me for another service later on; I don't know whether the visits were made to Salgue, or to one of his children. I think in the August following, in that same year. No, sir; that August bill that I charged him for, was not for his examination of him; I made no charge for telling him what I did. Yes, sir; I think any doctor who examined his heart could have discovered the symptoms I found; I detected it through his shirt. Yes; I think any ordinary examination would have disclosed it, at that time, when I examined him.

Dr. H. McHatton, sworn for the defendants, testified as follows:

Direct examination.

By Mr. Black:

I am a physician; and have been about twenty-six or seven years. I examined John A. Salgue for insurance for the Volunteer State Life of Chattanooga, in 1905; I think it was in July. Yes, sir; this is the medical examination I made at that time; that is my writing, my signature. Yes, sir; I asked Mr. Salgue those questions. I wrote the answers he gave me, recorded at the time. I asked him the question: "Have you ever been rejected or postponed by any life insurance company, assessment society, or benevolent order?" His answer was "No." I asked him question 22: "How long since you were attended by a physician, or professionally consulted one? The answer he gave was: "Three months ago, bad cold, three or four days, Dr. Ross, Macon, Ga." Yes, sir; I asked him question 28, which contains the words "palpitation of the heart." His answer was "No." The first part of that question is: "Have you now, or have you ever had any of the following diseases?" and there is a list in which is included "palpitation of the heart." No, sir; palpitation of the heart is not the same as a mitral murmur; palpitation is usually a nervous condition. Yes, sir; in examining Mr. Salgue, I discovered trouble with his heart; my recollection is I discovered an enlarged heart, with a mitral murmur. That is my recollection; it is on the application there, whatever I found. What I stated on the application at the time was "The applicant
86 has a mitral regurgitant murmur, first sound not strong, apex about an inch below the normal line and displaced to left." I suppose I have been examiner for various insurance companies for twenty-five years, possibly twenty-six. The whole question on which I made recommendation was as follows: "Where was this application made? At my office. Is the applicant free from any physical or mental defects? Cardiac disease. Is the risk first class, average or poor? Poor." Then the remarks: "Remarks; applicant has a mitral regurgitant murmur, first sound not strong, apex about an inch below the normal line, and displaced to left."

By Judge Miller: Yes, sir; I treated Mr. Salgue subsequent to the date of this examination. I have a memorandum of the dates in my pocket, taken from my books; I saw him on the 13th day of July, 1905; I saw him on the 2d of March, 1906; the 3d, the 20th and the 30th, April 13th and 15th, 1906. I don't know when he died. As to whether, in those subsequent interviews with him, my original opinion of the man's condition was confirmed, when I saw him, the last series of visits that I made him, his condition was exactly what you would have expected, taking into consideration his condition at the time the examination. That was the progressive course of the disease, the continuance of the original organic disease. As to whether, if he died on May 22d, was found dead lying on a railroad seat on a train, or sitting on a seat, that would have been the natural course, that would be one of the natural terminations of his type of condition. They very often, in that condition, after

they get to that point, die suddenly. Certainly if he died in that manner, either sitting at home or on a train, without a struggle, that confirms my opinion of the existence of the disease on July 13th, 1905. No, sir; there was not, in any one of those subsequent visits, anything to indicate that I was mistaken; I just went on and treated him for his increased heart weakness. No, sir; I did not advise his employers at any time before this insurance was taken out, that he was liable to die at any time; I saw one of his employers some time after the insurance, I cannot state how long afterwards, and told him, so far as his usefulness was concerned, the man's days were over. I can't say how long that was after the examination; I think it was a considerable time. As to whether that is about the exact language, my impression is he came to see me about the man, and said he was a valuable man in his
87 business, and he would be hard to replace, and my impression is I told him the man's days of usefulness were over, that he might sit around and direct his work for a certain length of time, but he could not do any more physical work. That is my impression of the conversation.

Cross-examination.

By Mr. WIMBERLY:

My recollection is that was some time after the examination at my office, possibly after I saw him the second time. Yes, sir; I saw him the second time in March, 1906; it may have been after that; I don't know exactly when it was. No, sir; the symptoms I found him suffering with on July 13th did not require any treatment. On July 13th, his cardiac condition was not bothering him, and he had no reason to know it existed from his own feelings, and when I heard his heart performing its duty, we do not give any medicine, because nature is taking care of it. No, sir; on July 13th, the heart trouble had not progressed so that he himself would know anything about it, there was no reason why he should know anything about it. No, sir; I did not tell him anything about it. As to whether at that time, to all appearances, to a layman, he had every appearance of a very vigorous, robust man, he was an unusually robust looking man. As to whether he had the appearance of being such a man as had no such stage of heart trouble as would affect his muscles, or his strength, or his ability to labor, I did not see why it should give him any trouble at all. As to whether there was, as late as July 13th, 1905, any need to treat him with digitalis or strophanthus, I should not have so treated him at the time. As to when was the first time I ever saw him that he had such a serious heart trouble as to call for the treatment of digitalis and strophanthus, I never saw him professionally between July 13, 1905, and March 2, 1906; at that time, his heart was giving him trouble. Yes, sir; that was the first time I saw him professionally when his heart was giving him trouble. No, sir, there wasn't any trouble with his health, other than this heart trouble, that I discovered, either in March, 1906, or in July. As to whether the displacement of the apex of the heart about an inch below the normal line, and also the displacement to the left, were

things that could be discovered by an examination, I discovered them that way. Yes, sir; that was the only way they could be discovered. No, sir; that was not a thing the patient would know. Yes, sir; any doctor who examined him with sufficient care should have discovered it; that part of it was not changeable; the murmurs are not changeable, but the displacement and enlargement are not changeable. Yes, sir; any doctor who may have examined him ought to have found the displacement of the apex.

By Judge MILLER:

As to whether it is possible that, along in that period, say in the month of June or July, when all these examinations were had, a different physician might have examined this man and not discovered the heart murmur, it is possible that during that period he could have been examined and not had the murmur, but the other part was permanent. The murmur sometimes disappears and returns; that was the least part of it; the enlargement of the heart was more important than the murmur. No, sir; when I examined Mr. Salgue for the Volunteer Life, and rejected him, I did not tell him anything about the condition of his heart; I did not tell him I had rejected him. Sometimes we reject or do not recommend a man, and the Medical Director does not see fit to take that recommendation, so we never know until a policy returns, whether it is accepted, or not.

GEORGE COLLIER, sworn for the defendants, testified as follows:

Direct examination.

By Judge MILLER:

In July, 1905, I represented the Volunteer State Life Insurance Company, of Chattanooga, Tenn. Yes, sir; that is a Tennessee Company. Yes, sir; I was residing then in Macon, and doing business there. Yes, sir; I wrote out the application for Mr. Salgue. Mr. Salgue signed this paper, that is attached to these interrogatories, and I witness it; that is my signature as witness. Yes, sir; that looks like the original paper. Yes, sir; in making out this paper, I asked him the questions. I think I asked him Question No. 6: "Has any company or association ever declined to grant insurance on your life, or issued you a policy of a different kind, or for a sum less than that applied for, or has any physician ever expressed a doubt as to your insurability?" I think I read the full question, but ordinarily, I asked: "Has any association ever declined you?" I wrote that answer, "No." I wrote it as he answered it. I think I read the full question to him; I don't know, but ordinarily we just say if any company has ever declined you. As to how long I had been in that business, my contract with the Volunteer State Life commenced on the first of June, 1905; I came here on the 5th of July, and I went to work on the 5th of July, soliciting insurance. No, sir; that was not my first case; I had taken one or two applications before. As to how I came to get Salgue, I was in the office of the Bibb Brick Company, and Mr. Joe Neal

and he introduced me to Mr. Salgue, and told Mr. Salgue: "George is in the insurance business, and he is a great friend of all of us in here, and if you can give him any insurance, we would appreciate it." I had never heard of Mr. Salgue until that time; I didn't know anything about him. I solicited Mr. Salgue, and he said that he thought he had as much insurance as he could take or had ability for, and Mr. Neel then said to him: "If you will give Mr. Collier an application, take his policy instead of some of the others you have got an application for;" and I then went out to see Mr. Salgue, and he consented to give me a policy upon the ground of friendship with these other people he was mixed up with himself, at Mr. Neel's particular request. Yes, sir; after I had completed making out his answers, I sent him to Dr. McHatton; Dr. McHatton was the examiner for our Company, and I sent him to Dr. McHatton, gave him Dr. McHatton's office hours, and he went there and was examined; I did not go with him. As to the result of that transaction, I got notice from the Company, my application and the medical examination are separate, not one and the same paper, as is the custom with some companies, and the first time I knew anything about it, I got notice from the home office. Mr. Salgue had been declined insurance.

By Mr. BLACK:

Question B reads "Is an application for insurance on your life pending at this time in any other company? If so, give the name of the Company?" The answer that he gave me was: "The Prudential and the Aetna." I mean, those were the ones I wrote down; that was all I wrote. I sometimes say, when they give me two companies, I say that is sufficient. Whether he answered any more or not, I don't know, but he gave me those two. I don't recall whether he gave me any more, or not.

Cross-examination.

By Mr. WIMBERLY:

90 Yes, sir; in taking this down, we do not always read the full question, we just give the substance of it to him, and try to get a substantially correct answer. Yes, sir; that question, has any company or association ever declined to grant insurance on your life, or has any physician ever expressed a doubt as to your insurability, I have frequently asked whether they had been declined. No, sir; in this particular instance, I do not know whether I asked any more than that, or not. As to whether I may have said two was enough, in regard to applications pending, that is all I recall he said, Prudential and Aetna, and I put them down, if he mentioned any others, I don't recall it at all. Yes, sir; before I went to write it at all, he said he had all the insurance he wanted, and it was suggested, as a matter of favor to me, or favor to Mr. Neel, who was one of his employers, that he could take mine instead of some other, and on that understanding he agreed to make the application to my Company. As to whether I remember what I said to the insured, and what the insured said to me, as to rejections, I

didn't know anything about any rejections; the first rejection I knew anything about was my own company. As to rejections, I do not remember at this time, whether I read the whole question to him, but I usually do not. As to whether, when I asked the question, and the witness made an explanation, then I would interpret for myself whether that was a rejection, and write the answer, there was nothing said whatever in Mr. Salgue's answer to cause me to believe that he had been rejected. As to what that "January 13, 1905," following "July 13, 1905," means, I guess that is a clerical error on my part, intending to write July 13th. Yes, sir; it was actually made on July 13th.

Dr. H. P. DERBY, sworn for the defendants, testified as follows:

Direct examination.

By Mr. BLACK:

My name is H. P. Derby. Yes, sir; I am a physician. I have been a physician since 1888. No, sir; I did not have occasion at any time to examine Mr. Salgue; I listened at his chest. I was with no other physician at that time. I was in the office with Dr. McHatton. As to whether it was at the time Dr. McHatton was examining Mr. Salgue that I listened at his chest, or prior to that time, McHatton was treating him at the time. I have no idea as to the dates when that was. As to what I discovered at that time when I listened to his chest, that listening was of very short duration; I did not give him a very thorough examination; I knew the man had cardiac trouble, and I just wanted to listen to it; that was all, and I listened sufficient to see that he did have a cardiac murmur; that was the extent of my examination. By a cardiac murmur, I mean that he had a sound there which was not normal, was not the normal heart sound. That indicated a trouble with the heart; as to what kind of trouble, in this particular instance, it indicated was valvular trouble of the heart.

Cross-examination.

By Mr. WIMBERLY:

No, sir; I do not recall the time, further than it was at the time Dr. McHatton had the case under treatment. No; I do not remember whether it was in March or April, 1906, if he testified he had the case under treatment during those months; I could not say as to the dates. Yes, sir; I listened because I was there, and I knew he was under Dr. McHatton's treatment for this particular trouble. No, sir; it wasn't that I wanted to familiarize myself with the sound; the man came in there looking for McHatton, and wanted to find out whether he should have a prescription refilled, one Dr. McHatton had filled. I knew Dr. McHatton intended for him to have it re-filled, and I told him so. The other part, I just listened to listen to it, and that was all. I only listened for a short time, much longer than a half second or a second; I did not make a complete examination. As to whether I knew he had cardiac trouble

because I heard Dr. McHatton discuss it, I knew it before I put my ear to him at all. Yes, sir; I knew Dr. McHatton had been treating him for heart trouble. No, sir; I did not see the prescription; he did not bring it with him. If a man were treating another as family physician for several months, say from the 5th of January to the 13th of July, during which time there were consultations of twenty or thirty times for supposed gastritis or stomach trouble, I should think it would be his duty to examine for every cause which might produce gastritis. Yes, sir; I should think that when a man comes in to see us, we would make a thorough examination to see what is the matter with him. As to whether, if a person has acid gastritis caused by the fact that his digestive powers are too good, he digests too fast, the usual treatment is to wash them out with water, and use electricity on them, I don't know that I would if his
92 digestion is good. Well, no; I don't think, when a man has one of those vigorous stomachs that has over-powers of digestion, that is what is commonly called chronic acid gastritis. As to whether it is regarded by the medical profession that the treatment of that trouble is to wash the man's stomach out with water, bringing its contents back through his mouth, and put electripodes on his back and stomach, and run electricity through his stomach, and put one down his throat, that may be one of the modes of treatment. As to whether that is the usual mode of treatment, it may be with some physician. As to whether it is with myself and Dr. McHatton and others I have noticed, I have never done it myself. As to whether I have ever known it done by Dr. McHatton or anybody I practiced with, I have not with McHatton and myself. Yes, sir; Dr. Charles Harrold, Dr. R. B. Barron, Dr. Gostin, Dr. Winchester and Dr. McHatton are all physicians of high standing here in Macon, as good as anybody.

Redirect examination.

By Mr. Black:

Yes, sir; I have heard of this water treatment, as it is called, for stomach troubles. It is used quite considerably; yes, sir. It is true that there is hardly any city that has not some physician that makes a specialty of stomach troubles that don't use that method of washing out stomachs. Yes, sir; that is a common treatment for stomach trouble. Yes, sir; I know Dr. McAfee. Yes, sir; he is a physician of standing in Macon. By "physician of standing," I mean that he has a good reputation. I mean of good standing.

For the defendant, The Prudential Insurance Company of America, Dr. Joseph W. Johnson testified by interrogatories as follows:

My name is Joseph W. Johnson, age 31, residence Chattanooga, Tennessee, Medical Director of the Volunteer State Life Insurance Company, Chattanooga, Tennessee, from November, 1903, to date. My duties are to pass upon all risks submitted to the Company for insurance. John Andrew Sadgne of Macon, Georgia, in the month of July, 1905, made application for insurance in this Company. He

was examined by our examiner at Macon, Dr. H. McHatton. I passed upon both application and medical examination when
93 it reached the home office of my Company. He was rejected by my Company upon the medical examination of Dr. McHatton.

(The defendant, Prudential Insurance Company, then introduced in evidence the application and medical examination of John A. Salgue to the Volanteer State Life Insurance Society, dated July 13, 1905. Said documents are as follows:)

EXHIBIT A.

To my *disposition* in Moore vs. Prudential Insurance Co., 10/10/08.

JOSEPH JOHNSON.

Application for Insurance in The Volunteer State Life Insurance Company.

Rejected.	Home Office.	Received.
7 17 05	Chattanooga, Tennessee.	July 15, 1905.
J. W. J.		P'y No. 273.

This application is the basis and a part of a proposed contract of insurance, subject to the charter of the company, and the laws of the State of Tennessee.

1. A. What is your full name? John Andrew Salgue.
B. Where do you reside? No. 1921 Street, No. 2d St City or town, Macon. County, Bibb, State, Ga.
C. What is your business address? Bibb Brick Co.
D. To what post-office address are communications to be sent? 1921 So. 2d St., Macon, Ga.
E. My former residences were: Norfolk, Va.
2. A. Where were you born? Gallipolis, Ohio, Gallia (State or unty).
B. When were you born? Month, Oct. Day, 28, Year, 1863.
C. Age nearest birthday? 42.
D. Are you married? Yes.
E. Do you intend living or traveling outside the United States xclusive of its tropical possessions and Alaska), Canada or Europe? If yes, give particulars. No.
3. A. What is your present occupation, kind of business, position held, and length of time so engaged? Answer in . Brick Maker, all of his life.
3. What other occupations, if any, have you followed and how g in each? No.
. Do you intend changing your present occupation? If yes, e particulars. No.
. Are you now engaged in, or have you ever been engaged in, ave you any intention of engaging directly or indirectly in the

manufacture, sale or handling of malt or spirituous liquors? Give full particulars.

4. A. Are you now insured in this or any other company or association? Answer yes or no. Yes. If so, give name of company, amount insured, and kind of policy held. If in this company give number of policy also.

B. Has any company or association ever declined to grant insurance on your life, or issued you a policy of a different kind, or for a sum less than that applied for, or has any physician ever expressed a doubt as to your insurability? Answer yes or no. No.

C. If yes, give name of company or companies, and when.

Name of Company.	Amount	Kind of policy.
Prudential	2000	20 P. L.
Mutual Life	2000	20 Gold Bond

D. Is an application for insurance on your life pending at this time in any other company? If so, give name of company. Prudential & Aetna.

5. A. What kind of policy is desired? Whole Life.

B. What is the dividend period? 5 year.

6. A. Sum to be insured? $5,000.

B. Is premium to be paid annually, semi-annually, or quarterly? Annual.

C. What amount have you paid in advance on account?

7. A. To whom is this insurance to be payable at your death? Full name. My Estate.

B. Do you wish the privilege of changing the beneficiary at any time, if the policy or any interest therein be not then assigned? Answer yes or no. Yes.

I hereby declare and warrant that I am in good health, and of sober and temperate habits, and that all the statements and answers to the foregoing questions are complete and true, and that the foregoing, together with this declaration, and any statements I may make to the Company's Medical Examiner in connection herewith, shall constitute the application and become a part of the contract for the insurance hereby applied for.

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I hereby agree, that if within two years from the date hereof I shall engage in blasting, mining, submarine labor, aeronautic ascensions, the manufacture or handling of highly explosive substances, the sale by retail of malt or spirituous liquors or as lineman, putting up and handling highly charged electric wires, tending dynamos, puddling or working on any steamboat or other vessel, or on any railroad train as engineer or fireman, switching or coupling cars, or as conductor or brakeman of freight trains unless written permission is granted by the Company, or should death result in consequence of a duel or suicide, whether sane or insane, the liability of the Company shall not exceed the amount of premiums paid on the policy.

I further agree and warrant that I will not engage in any military or naval service in time of war during the continuance of the

said contract without first obtaining written permission from the Company.

I hereby agree that the policy herein applied for shall be accepted, subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full during my continuation in good health.

The Applicant will please read carefully the answers written after each of the above questions before signing this application.

Signature of the person whose life is to be insured.

JOHN A. SALGUE.

Witness to Signature.
GEO. COLLIER.

Dated at Macon, Ga., this 13 day of July, 1905.

Be sure that every question is answered in legible writing, and that the date of birth is correct. To be filled in by the Soliciting Agent. Give date on which examination was ordered. Jan. 13, 1905.

Who secured the above application? Geo. Collier.
General Agent: Geo. Collier. Located at Macon, Ga.
No. Pv. 273. Name John A. Salgue.
96 Sex M. Does husband apply? Has his application been approved? No. Kind. Whole Life. Dividend Period. 5 Years. Age. 42. Amount. 5,000 A Premium $165.35. Annual Premium $165.35. Made out by C. C. Form 1. App. Ex. for Pol 7 15 05 Pol. Ex.

Exhibit B

To my deposition in Moore vs. the Prudential Life Insurance Co. 10/10/08

JOS. W. JOHNSON.

The Volunteer State Life Insurance Company.

Home Office,
Chattanooga, Tennessee.

Medical Department.
Joseph W. Johnson, M. D., Medical Director.

Instructions to Medical Examiners.

1st. This examination must be made in private, sufficient time to make same accurate and thorough.

2d. Do not make an examination unless you have in your possession the application properly filled out and signed by the applicant.

3d. Read the examination over carefully before mailing to the

Home Office, to see that all questions are fully answered, thus avoiding correspondence and delay.

4th. The examination must be sent direct to the Medical Department of this Company by the Examiner.

Answers Made to the Medical Examiner in Continuation of, and Forming a Part of, My Application for Insurance in the Volunteer State Life Insurance Company, dated July 13th, 1905, for $5,000.

97

1. Name in full? John Andrew Salgue.
2. Residence? Macon, Ga.
3. Do you intend changing your present residence? (If yes, state particulars.) No.
4. Date of birth? Oct. Day? 28. Month? Oct. Year? 1863.
5. Place of birth? Gallipolis, Ohio.
6. Present Occupation? (State Particulars). Brick Maker.
7. Do you intend changing your present occupation? (If yes, state particulars.) No.
8. What other occupations have you followed, and how long in each? (State particulars.) None.
9. Have you ever been engaged in the manufacture, sale or handling of malt or spirituous liquors? (If yes, state particulars.) No.
10. Have you ever, or do you now use malt or spirituous liquors to excess? No.
11. The daily quantity used? None. Malt liquors? None. Wines? None. Spirits? None. How much in any one day at most? None.
12. Have you ever taken treatment for alcoholic or narcotic habits? (If yes, state particulars.) No.
13. To what extent do you use tobacco? Daily amount? Form? None.
14. Do you now use, or have you ever used, opium, chloral, morphia or any other narcotic? (If yes, state particulars.) No.
15. Are you now insured? Yes. Amount? 2,000.

2,000.

Companies or Associations? Mut. Life, Prudential.
Date Sept. 9, May 9.
16. Have you ever been rejected or postponed by any Life Insurance Company, Assessment Society, or Benevolent Order? No. When? x By what Company, Society or Order? x For what reason? x.

98

17. Have you ever received a pension? (If yes, state particulars.) No.
18. Have you ever received a severe injury? No.
19. Have you ever undergone a surgical operation? No.
20. Are you now, or have you ever been ruptured? (If yes, state particulars.) Yes. If yes, do you agree to wear a properly fitting truss? Yes.

-1. As far as you know, are you now in good health? Yes.
-2. How long since you were attended by a physician, or profes-

sionally consulted one? 3 Mos. For what disease? (State particulars.) Bad cold 3 or 4 days.

23. Give name and residence of such physician? J. T. Ross, Macon, Ga.

24. Give name and residence of your family physician? J. T. Ross, Macon, Ga.

25. Has your weight changed in one year? No.

26. Have you ever been advised to change climate for benefit of your health? (If yes, state particulars.) No.

27. How long have you resided in your present locality? 1 mos. Have you now, or have you ever had any of the following diseases? (Answer Yes or No to each. If yes, state particulars under head of remarks):

Apoplexy? No. Habitual Headache? No. Acute Rheumatism? No. Chronic Diarrhœa? No. Asthma? No. Dizziness? No. Syphilis? No. Dysentery? No. Chronic cough? No. Sunstroke? No. Cystitis? No. Varicose vein? No. Spitting of blood? No. Paralysis? No. Stricture? No. Appendicitis? No. La Grippe? No. Loss of Consciousness? No. Diseases of the skin? No. Tumor? No. Pneumonia? No. Persistent neuralgia? No. Fistula? No. Palpitation of the heart? No. Pleurisy? No. Nervous prostration? No. Hemorrhoids? No. Jaundice? No. Epilepsy? No. Insanity? No. Renal or hepatic calculus? No. Diseases of the liver? No.

29. Have you ever had any illness or disease other than stated by you above? When? How long sick? Nature of illness? See remarks.

9

Family History.

	Age, if living.	Condition of health.	Age at death.	Cause of death.	How long ill.	Previous health
ather	. .	. . . .	57	Don't know.	Not long.	Good.
other	. . . .	. . . .	40	Accidental.	. . .	Good.
rothers, 2,	. . .	. . . .	21	. . . .	. . . .	Good.
			26	. . . .	. . . .	Good.
sters, 2	28	Good	26	Tuberculosis.	3 mos.	

9. . . . . Have either of your paternal or maternal grandparents died of Consumption, Insanity, Cancer, Bright's Disease, Apoplexy or any hereditary disease? If yes, which one and at what age? No.

31. Is your wife or any member of your immediate family affected with consumption? No.

32. Has any near relative, including uncles and aunts, been affected with consumption? No.

Remarks or Declaration Assured May Make to the Examiner.

In 1898 fell from a boat in very cold weather, some days afterwards began to have pains in joints, especially in knees, had no swelling, did not stop work, but condition lasted about three months.

It is hereby agreed that all the statements made in answer to the foregoing questions and explanations of same are warranted to be true, and are hereby made a part of this contract.

Dated at Macon, Ga., this 13th day of July, 1905.

Witnessed by the Examiner H. McHattan, M. D.

Signature of the person to be insured.

JOHN A. SALGUE.

Questions to be Answered by the Medical Examiner.

A. By what means are you satisfied as to the identity of the party you are about to examine? By appointment with agent.

B. Is there any physical mark of identification? (If yes, state particulars). No.

C. Were the answers above signed in your presence by the applicant? Yes.

D. Does the applicant look older than age stated? No.

E. Have you any reason to doubt any statement made by the applicant? No.

F. Have you any reason to suspect intemperate habits? (If yes, state particulars). No.

G. Describe occupation of applicant. Boss brick maker.

H. Race? White. Sex? Male. Complexion? Fair—General appearance, good.

I. Is there any discharge from the ear or any defect in hearing? (If yes, state particulars). No.

101 J. Is there any defect in sight? (If yes, state particulars). No.

K. Temperature (under tongue)? 99.

L. Rate of pulse per minute? 70.

M. Is it irregular? No.

N. Is the heart action clear, regular and normal in its force? No.

O. Is there any murmur with either sound or enlargement of the heart? (If yes, state particulars). Mitral.

P. Applicant's height? 5-7. Weight? 165½.

Q. Did you weigh and measure him? Yes.

R. Measurement of chest on full inspiration? 41. On forced expiration? 37¼.

S. Girth of abdomen? 36¼.

T. Shape of chest? (Examination of chest must be made stripped). Good.

U. Number of respirations per minute? 19.

V. Is respiration full and uniform throughout each lung? Yes.

W. Did you find any indication of disease of the respiratory organs? No.

X. Is there any disease of the throat? No.

Y. Has the applicant any disease or disorder of the nervous system? No.

Z. Is there any eruption on the body? No.

Z-1. Is there any evidence of the disease of the stomach, bowels or liver? No.

Z-2. Is there any evidence of the disease of the pelvic organs? No.

Z-3. Does the applicant's appearance indicate good health. Yes.

Analysis of Urine.

A. Was urine voided in your presence by applicant? Yes.

B. —.

C. Did you examine urine within twelve hours after voiding? Yes.

D. Specific gravity? 1025. Reaction, acid. Albumen? No. Test employed? Hilber. Sugar? No. Test employed? Feblings.

Z-4. Where was this examination made? My office.

Z-5. Is the applicant free from any physical or mental defects? No cardiac disease.

Z-6. Is the risk first-class average or poor? (If classed average or poor, state reasons under remarks). Poor.

102 Any Remarks the Examiner May Wish to Make as the Result of His Examination

Applicant has a mitral.
First sound not strong.
Apex about an inch below normal line and displaced to left.

I hereby certify that the above and foregoing statements and answers are true.

Made at Macon, Ga., this 13 day of July, 1905.

H. McHATTAN, M. D.,
Medical Examiner.

To Be Filled In by the Examiner.

Application received July 13th, 1905.
Mailed to Home Office, July 14, 1905.
Post Office, Macon, State, Ga.

Table of Height and Weight.

Based Upon Analysis of 74,162 Accepted Male Applicants for Life Insurance.

The light-faced figures are 20 per cent. over and under the average.

Feet	Inches	Ages. 15–24	Ages. 25–29	Ages. 30–34	Ages. 35–39	Ages. 40–44	Ages. 45–49	Ages. 50–54	Ages. 55–59	Ages. 60–65
		96	100	102	105	105	107	107	107	105
5	0	120	125	128	131	133	134	134	134	131
		144	150	154	157	159	161	161	161	157
		98	101	103	105	107	109	109	109	107
5	1	122	126	129	131	134	136	136	136	134
		146	151	155	157	161	163	163	163	161
		99	102	105	106	109	110	110	110	110
5	2	124	128	131	133	136	138	138	138	137
		149	154	157	160	163	166	166	166	164
		102	105	107	109	111	113	113	113	112
5	3	127	131	134	136	139	141	141	141	140
		152	157	161	163	167	169	169	169	168

Feet	Inches	Ages.	Ages.	Ages.	Ages.	Ages.	Ages.	Ages.	Ages.	Ages.
5	4	105	108	110	112	114	115	116	116	115
		131	135	138	140	143	144	145	145	144
		157	162	166	168	172	173	174	174	173
5	5	107	110	113	114	117	118	119	119	118
		134	138	141	143	146	147	149	149	148
		161	166	169	172	175	176	179	179	178
5	6	110	114	116	118	120	121	122	122	122
		138	142	145	147	150	151	153	153	153
		166	170	174	176	180	181	184	184	184
5	7	111	118	120	122	124	125	126	126	126
		142	147	150	152	155	156	158	158	158
		170	176	180	182	186	187	190	190	190
5	8	117	121	123	126	128	129	130	130	130
		146	151	154	157	160	161	163	163	163
		175	181	185	188	192	193	196	196	196
5	9	120	124	127	130	132	133	134	134	134
		150	155	159	162	165	166	167	168	168
		180	186	191	194	198	199	200	202	202

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Feet.	Inches.	Ages.	Ages.	Ages.	Ages.	Ages.	Ages.	Ages.
5	10	123	127	131	134	136	137	138
		154	159	164	167	170	171	172
		185	191	197	200	204	205	206
5	11	127	131	135	138	140	142	142
		159	164	169	173	175	177	177
		191	197	203	208	210	212	212
6	0	132	136	140	143	144	146	146
		165	170	175	179	180	183	182
		198	204	210	215	216	220	218
6	1	136	142	145	148	149	151	150
		170	177	181	185	186	189	188
		204	212	217	222	223	227	226
6	2	141	147	150	154	155	157	155
		176	184	188	192	194	196	194
		211	221	226	230	233	233	233
6	3	145	152	156	160	162	163	161
		181	190	195	200	203	204	201
		217	228	234	240	244	245	241

Ages.	Ages.	Ages.
139	142	144
174	178	180
209	214	216
148	146	148
185	183	185
222	220	222
151	151	151
189	189	189
227	227	227
154	155	154
192	194	192
230	233	230
158	158	
198	198	
238	238	

106 Indorsement: The Volunteer State Life Insurance Co. Home Office, Chattanooga, Tenn. Medical Examination of John A. Salgue. The blank spaces are to be filled up only at Home Office. Number Py 273. Amount 5,000. A premium 165.35. Received at Home Office, 7 15 05. Agent George Collier. Examiner H. McHattan. Examined 7 13 05. Rejected Jos. W. Johnson, Med. Director. Date July 17, 1905.

For the defendant, The Prudential Insurance Company of America, GEORGE W. WILKINS testified by interrogatories as follows:

My name is George W. Wilkins. I am 66 years old, and reside at Montreal, Canada. I am connected with the Sun Life Insurance Company. I am chief medical officer and have been chief medical officer for about 20 years, which is the same position as medical director in most companies. My duties are to revise all applications for insurance, and advise whether or no they shall be accepted or declined. One John Andrew Salgue of Macon Georgia, applied to us for insurance as per application, dated 28th June, 1905. I have now before me the original application and the report of the medical examiner, also revival certificate, dated Macon, Georgia, October 20, 1905. The rules of our company do not permit me to part with the original papers. I therefore attach hereto, identified by my signature, certified by me a copy of the application and revival certificate and medical report which I certify to be correct. The application and medical examination made by our Medical Examiner, Dr. R. B. Barron, was submitted to and approved by me. I have no knowledge to the advantage of either parties, except that from correspondence that I now see before me. I believe policies were not taken up at the time that they were issued, but were subsequently issued on the production of revival certificate, copy of which is attached hereto.

(The following are copies of the application, medical examination and revival certificate referred to in the testimony of the above witness:)

107

No. 124881 & 2.

Application for Assurance to the Sun Life Assurance Company of Canada.

1. Name (in full) of life to be assured?
   John Andrew Salgue, Macon, Ga.
2. Occupation? (Mention exact line of business; if more than one, state all).
   Supt. of Bibb Brick Co.
3. Have you ever been connected with the manufacture or sale of liquors? Are you so engaged now?
   No.
4. Place and date of birth?

Place.	Year.	Month.	Day.
Gallipolis, Ohio	1863	Oct.	28

5. Age nearest birthday?
43.
6. Are you married?
Yes.
7. Sum to be assured?
$6000, $3000 and $3000 two policies.
8. Kind of policy? If on the reserve dividend plan, state the R. D. period.
Ordinary life now par.
9. If a "Guaranteed Income Policy" is desired, please answer the following:
Date of birth of beneficiary? Age next birthday?
10. Are premiums to be paid annually or half yearly?
Annually. Premium—$178.20.
11. Name in full and occupation of person to whom the assurance is to be paid in event of death?
a. Estate. Interest of beneficiary in the life.
b. If endowment or on the reserve dividend plan, to whom payable if the life survives the endowment or reserve dividend period.
108 Estate.
c. Do you wish to reserve the right to change the beneficiary at any time, provided the policy has not been assigned?
Yes.
12. Name of intimate friend (not a relative)?
Name—W. J. Masse.
Occupation or profession—Brizck manufacturer.
Residence—Macon, Georgia.
13. Are you now assured in this company or have you ever been? If so, give details?
No.
14. Are you now or have you ever been assured in any other assurance company or society? If so, kindly give the details.

Company.	Amount	Kind of policy.	Year when taken.	If cancelled, date of lapse.
N. Y. Life	$2000	20 Pay.	1898	In force
Prudential	$2000	Gold B.	1902	" "

15. Has any company ever declined to assure your life or offered you a policy on a different plan or at a higher premium from that for which you applied?
No.
16. Has any physician ever given an unfavorable opinion regarding your life? Give details?
No.
17. Has any application been made by you to any company or agent and afterwards withdrawn or not yet completed? Give details?
No.

18. Have you paid the first premium upon the policy applied for? If so, what amount and to whom? Give the number of interim receipt?

No.

109 I warrant that the above answers are full and true, and that I am now and usually in sound health; and I agree that this declaration with the answers to be given by me to the medical examiner, shall be the basis of the policy and of the interim assurance should any be granted; that the methods which may be adopted by the company for any distribution of surplus and its determination of the amount apportioned to said policy, are hereby accepted for every person who shall have any interest in said policy; that I will accept said policy when issued and pay the first premium thereon, and that said policy shall not take effect until the first premium has been been paid during my life and good health; that if any premium be settled wholly or in part by check, note or other obligation, such obligation shall not be considered as payment, but only as extension of the time for payment, and if not fully paid when due, the company shall not be liable, if death occurs while such obligation remains unpaid; that if any premium be not — in full when due, said policy shall thereupon become void unless specially provided in express terms in the policy that it shall be kept in force under the non-forfeiture agreement; that no premium shall be considered paid unless a receipt be given therefor, signed by the president or secretary, that if I die by my own act, whether sane or insane, within one year from this date, then said policy shall be void.

Dated at Macon, Ga., the 28 day of June, 1905.

(Signed) JOHN ANDREW SALGUE.
(Life to be assured.)

I confirm the foregoing declaration and agreement.

Witness:

(Signed) E. H. HOLLAND.

Questions to be Asked by Medical Examiner.

Name of person examined. John Andrew Salgue.
Exact occupation. Supt. Brick Maker.
Age. 42.

1. Family History—
Father alive or dead? If alive, at what age? State of health? If dead, age at death?
67 years.
Cause of death?
Don't know, I was away from home.
How long ill?

Mother alive or dead? If alive, at what age? State of health? If dead, age at death?
40 years.
Cause of death?
Drowned.
How long ill?
Brothers—Total number?
Two.
How many living?
Ages?
How many dead?
Two.
Ages at death?
23 and 26 years.
Cause of death?
Killed by boiler explosion.
Killed by falling trestle.
Sisters—Total number?
Two.
How many living?
One.
Ages?
28.
State of health?
Good.
How many dead?
One.
Ages at death?
23.
Cause of death?
Contracted consumption.
How long ill?
Three months.

2 When any indefinite term, such as "Childbirth," "Change of life," "Exposure," "Intemperance," "Dropsy" or "Unknown," is used in above record:
a. Was cough present during last illness?
b. How long in impaired health previous to death?
111 *c.* In case of "Childbirth," how long did she survive delivery?
Referring to death of
a.
b.
c.

3. When any member of family has died of any lung disease
Referring to death of sister.
How long was she subject to cough before death?
Three months.
How long in impaired health?
Three months.

4. Has any uncles or aunts or other relatives died of or suffered from consumption, bronchitis or other chronic lung diseases?
No; only sister, as above.
5. Have any relatives suffered from insanity, epilepsy or gout?
No.
6. Is any member of the household with which you reside now suffering from lung trouble, or has any such member died from lung trouble within the last two years? Give details.
No.
7. Are you now in perfect health?
Yes.
8. When were you last confined to the house by illness? Give details?
April, 1905. Bilious attack; sick one day.
9. *a.* On what occasions have you consulted a physician.
As above.
b. Have you ever consulted a physician about your lungs or for a cough?
No.
10. Have you ever suffered from any complaint or affection:
11*2* *a.* Of the brain or nervous system (fits, insanity, loss of consciousness, spinal disease, delirium tremens, sunstroke, difficulty with eyesight or hearing, etc., included?)
No.
b. Of the throat or lungs (asthma, bronchitis, habitual cough, spitting or coughing of blood and lung or chest disease of any kind included?)
No.
d. Of the digestive organs (dyspepsia, dysentery, liver complaint, hernia, fistula, etc., included?)
No.
e. Of the urinary or generative organs (gravel, renal or hepatic colic, stricture, diabetes, etc., included?)
No.
f. Other complaints (such as debility, suppurating glands, gout, rheumatism, dropsy, cancer, syphilis?)
No.
11. Have you had any other illness, disease, operation or injury? Give details.
No.
12. *a.* Have you been vaccinated?
Yes.
b. Have you had small-pox?
No.
13. *a* Do you ever take wine, spirituous or malt liquors? If so, to what extent?
Don't use at all.

b. Have you ever used them more than now, if so, to what extent?
No.

c. Have you ever used them too freely, if so, when, how long and to what extent?
No.

d. Have you undergone any treatment in this connection or been advised on the score of health to lessen the amount taken by you?
No.

113 14. Have you used opium or other narcotics?
No.

15. Where have you resided? When and how long in each country?
Ga., 4 years; 6 in Va., 8 in Pa.

16. Have you changed your residence or occupation on account of health?
No.

17. Have you any intention of going to any tropical or unhealthy country or of changing your occupation? Give details?
No.

18. Are you aware of any circumstances not disclosed above which might have an unfavorable bearing upon he [the] desirability of the risk?
No.

I certify that my answers to the foregoing questions are correctly recorded. [recorded] and understand and agree that the company is not bound by any statements which I may have made to any person if not written above.

Date June 29th, 1905.

Signature of applicant.

(Signed) JOHN ANDREW SALGUE.

In presence of

(Signed) ROBERT B. BARRON,
Medical Examiner.

114 *Report and Opinion of Medical Examiner.*

1. Are you personally acquainted with applicant? How long have you known him?
No.

2. Have you attended him professionally? If so for what and when?
No.

3. What is your opinion of the locality in which he resides?
First Class.

4. Do you think his social and financial position warrants his applying for a policy of the amount proposed?
Yes.

5. Have you any reason for hearsay personal knowledge or appearances to suspect that he uses liquor otherwise than in a strictly temperate manner?
No.

6. Description:
Height in boots, 5 ft. 8½ inches.
Weight in summer clothing, 168 lbs.
Circumference on full inspiration 40.
Circumference on forced expiration, 36.
Measure around abdomen, 37.
Figure erect or stooping—erect.
Race, white.
Color of hair, brown.
From his appearance what would you estimate his age to be?
42 years.
7. *a*. Has he ever weighed more than at present, if so how much?
No.
b. When did the decrease commence? What was its cause?
None.
c. When did he cease to lose weight, or is it still going on?
None.
8. Have you made a stethoscopic examination of the chest on the naked skin? This is required before policy will be issued?
Yes.
115 9. *a*. Is respiratory murmer clear and distinct over every part of both lungs, and are the organs of respiration perfectly healthy?
Yes.
b. Is there any peculiarity in shape capacity or movements of the chest?
No.
Number of respirations per minute?
18.
10. *a*. Are the heart's sounds and action regular and in every respect normal? Note: If there are any indications of heart disease, describue fully their nature if valvular, what valves are affecte d, the nature of any murmur that may be present whether functional or organic; also whether there is any enlargement.
Yes.
b. Is there any intermission irregularity or peculiarity in the pulse?
No.
Number of pulsations per minute?
76.
c. If applicant is over 50 years of age have you examined heart and blood vessels for signs of arterial sclerosis?
None.
11. Are the brain, nervous system, liver and other organs perfectly healthy?
Yes.
12. Examination of Urine:
What evidence have you that the urine examined by you was passed by applicant?
Saw him pass it.
Specific gravity?
1020.

Albumen?
None.
Sugar?
None.
Anything abnormal in urine or micturation?
No.
Has he ever been told that he has albumenuria?
No.

116 13. If applicant be a woman:

a. Past and present state of uterine functions?

b. How long has she been married?

Is she now pregnant?

d. How many children at full term has she had?

e. How many miscarriages? What circumstances? When was the last? Have any consequences affecting or likely to affect her health resulted?

f. Have labors been difficult or dangerous? Is any risk apprehended in future?

g. Has she experienced "change of life," if so when?

14. General appearance: Strong, vigorous, rugged, delicate, ruddy or pale?

Strong.

15. Insert here a summary of all unfavorable features either personal or connected with the family history which in any way detracts from the quality of the life.

None, only sister died of consumption.

16. What "expectation" do you give applicant?

The expectation for first class lives is as follows: Age 20, 42 years; Age 25, 39 years; Age 30, 35 years; Age 35, 32 years; Age 40, 28 years; Age 45, 24 years; Age 50, 21 years; Age 55, 17 years; Age 60, 14 years; Age 65, 11 years; 26 years.

17. Leaving family history out of consideration how would you classify his chances of long life—as over average, good, fair, doubtful or bad.

Good.

18. Assuming the correctness of the answers given by applicant and reviewing the result of your own examination, do you recommend that a policy be granted? If "yes" (*A*) at ordinary rates and and without a lien; or (*b*) subject to a lien?

Yes, at ordinary rate without a lien.

The medical examiner will kindly remember that the company looks to him to protect its interest by answering the questions as fully and carefully as possible, and by stating any additional *facts* (by private letter or otherwise) which, according to his *judgment*, will enable the Head Office better to judge the eligibility, or otherwise of the risk.

117 I have this day examined the above applicant in private no other person being present.

Dated at Macon, Ga., this the 29th day of June, 1905.

Signature of Medical Officer.

ROBT. B. BARRON.

We the undersigned commissioners do hereby certify under our oath of office that this is the certified copy of the Application and Medical report referred to by the witness George Wilkins.
15th October, 1908.

J. W. OAK,
A. R. MASTERS,
Commissioners.

Agent's Report.

1. How long have you known applicant?
Short time.
2. Have you ever heard of his being ill? Give particulars.
No.
3. Is he in thoroughly good health now?
Seems to be.
4. Is he perfectly sober and temperate and has he always been so?
Don't know.
5. Do you consider his life to be over average, average or under average?
Over average.
6. What is the object of this assurance?
Protection of estate.
7. Have you any reason to suppose that it is intended to assign the assurance to some third person If so give full details.
No.
8. Is the financial position of applicant such as to warrant his applying for a policy of the amount proposed?
Yes.
118 9. Do you unqualifiedly recommend for assurance at ordinary rate.
Yes.
Dated at Macon, Ga., 6-29-1905.
(Signed) E. H. HOLLAND, *Agent.*

Friend's Report.

This form should in all cases be filled up in the handwriting of the friend and not the agent.
1. How long have you known Mr. Salgue?
Four years.
2. *a.* Are his habits in all respects absolutely temperate?
Absolutely.
b. Have they always been so?
To the best of my knowledge.
c. Have you ever known or heard of his being under the influence of liquor?
No.
3. Have any near relatives been afflicted with consumption, lung trouble or any hereditary disease?
No.

4. Has he suffered from any serious illness?
No.
5. Is he at all subject to colds or coughs?
No.
6. Does he show any indications of weakness of constitution?
No.
7. Do you consider him as regards robustness to be over the average, average, or under the average of men at his age?
Over the average.
8. Is his financial position such as to warrant his applying for a policy of the amount proposed?
Yes.
9. Do you consider him one of the best lives of his age known to you, or do you consider him only a fair life?
One of the best—very best in fact.
Dated at Macon, Georgia, July 1, 1905.
(Signed) N. J. MASSEE,
V. Pres. Bibb Brick Co.

119 Sun Life Assurance Company of Canada.

Revival Certificate.

Policy 124882.
Lapsed ——

Applicant's Statement and Declaration.

1. Are you now in an unexceptionably state of health? Yes.
2. Do you suffer from any weakness, disorder or disease? No.
3. Since you applied for this policy have you had any disorder or illness of any kind, or required any medical attendance? Give details. No.
4. Have there been any deaths among your relatives since the issue of your policy, or are any of them now in poor health? If so, give full details. No.
5. Are you strictly sober and temperate in your manner of living
Yes.

I, the person whose life is assured by Policy No. 124882 of the Sun Life Assurance Company of Canada, which policy has lapsed, do hereby apply to have the same revived, such revival to be based on the truthfulness of the above answers.

(Signed) JOHN A. SALGUE.
(Signature of life assured.)

Place and date Macon, Ga., Oct. 20, 1905.

I confirm the above statements and application.

—— ——.
(Signature of beneficiary.)

Agent's Report.

1. Are you personally acquainted with applicant; if so state for how long? Few months.
2. When did you last see him? October 20, 1905.
3. What are his habits in regard to the use of intoxicating liquors? Uses none to my knowledge.

120 4. Have you any reason to believe that any of the statements made in the above declaration are otherwise than in accordance with the facts of the case? No.

5. Do you consider him to be above or below the average life of his age as regards health and robustness? Above.

6. Do you unreservedly and without hesitation recommend the applicant as an unexceptionable life for assurance, and that the policy be revived? Yes.

(Signed) E. H. HOLLAND, *Agent.*

Place and date Macon, Ga., Oct. 20, 1905.

Medical Report.

I certify that I have this day carefully examined the above mentioned Mr. J. A. Salgue and find as follows:

1. Present weight? 168 lbs.
2. Are lungs and heart normal? Yes.
Is urine normal? Yes.
3. Does he suffer from any weakness or disorder of any kind whatever? No.
4. Is he now in unexceptionably robust health in every way? Yes.
5. Has he at any time during the last ten years suffered from any illness or weakness of any kind, or required any medical attendance? Had malaria in Feb. 1905.
6. Have you any reason to suspect that his habits are in the slightest degree intemperate? No.
7. Do you unreservedly and without hesitation recommend him as in every respect a desirable life for assurance at ordinary rates? Yes.

(Signed) ROBT. B. BARRON.

Place and date Macon, Ga., Oct., 20, 1905.

Medical Fee Must Be Paid By Applicant.

121 For the Defendant, The Prudential Insurance Company of America, ELMER A. SCOTT testified by interrogatories as follows:

My name is Elmer A. Scott. I am 38 years old, reside at Asbury Park, New Jersey. I am a physician. I was connected with the Provident Savings Life Insurance Society of New York from 1900 to 1906 as Assistant Medical Director and Medical Director during this time. John A. Salgue made application for insurance to the

Society named. He was examined by Dr. Robert B. Barron of Macon Georgia. The application and medical examination was passed upon by me.

(The Defendant, Prudential Insurance Company next introduced in evidence the application and Medical Examination of John A. Salgue to the Provident Savings Life Insurance Society.)

(These papers were as follows):

Part I.

I hereby apply to The Provident Savings Life Assurance Society of N. Y. for assurance upon my life.

Full name: John Andrew Salgue.

Sex: Male.

Residence: 1921 Second street, Macon, Ga., Bibb County.

Place of Business and Name of Employers; Street and Number. Bibb Brick Company, Macon, Ga.

Nature of Business: Superintendent.

Place of Birth: Gallipolis, Gallia County, Ohio.

Date of Birth: Oct. 28th, 1863.

Age, nearest: Forty-two (42) years.

Single, married or widowed: Married.

The address to which I desire notices of premium sent is Bibb Brick Co., Macon, Georgia.

122 Present occupation (specific)? Supt. Bibb Brick Co.

Past occupation? Same.

How long have you resided at above address? Three years.

Where did you formerly reside? Norfolk, Virginia.

Do you contemplate changing your residence or making a journey? If yes, when and to what place? No.

Amount of insurance desired? $5,000.00.

Premium of $184.40 paid? Annually.

Kind: Term and continued payments. Spec. Investment.

Form No. 906.

Assurance for benefit of? Estate.

(On prior decease of Beneficiary such interest to revert to Assured).

Residence of Beneficiary?

Relationship of Beneficiary to Applicant?

Do you wish to reserve the right to change the beneficiary at any time, if the policy be not then assigned? Yes.

Are you now or have you ever been assured in this Society and for what amount? No.

Are you now insured in any other life assurance organizations? If so, state name of such organizations and the amount insured in each? Prudential, N. J., $1,000.00; Mutual Life, N. Y., $2,000.00.

Are you negotiating for life insurance? If so, state in what organization and for what amount? No.

Are you now or have you ever been engaged, directly or in-

directly, in either the sale or the manufacture of wines, spirits or malt liquors? *No.*

Has any life assurance organization ever postponed, rejected or limited as to amount, form or premium, your application for
123 assurance or restoration of lapsed policy? (Full particulars required). *No.*

Do you agree that no statements, promises, information, or agreements made or given by, or to, the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the Society, or in any manner affect its rights unless such statements, promises, information or agreements be reduced to writing, attached to this application and approved by the officers of the Society at the Home Office? *Yes.*

I hereby warrant on behalf of myself and any other person who shall have or claim any interest in any policy issued hereunder, that all statements and answers contained in this application, consisting of Part I and Part II, by whomsoever they may be written, are material to the risk, and are true and complete and are offered as the sole basis of the proposed insurance; and that, if any such statements or answers be either untrue or incomplete, or if any of the conditions of the policy be violated, said assurance shall be null and void and all payments made or accepted on account thereof shall be forfeited to the Society except to the extent as provided in the policy.

I hereby agree:

1. That, unless with the written permission of the Society in every case, I will not, within two years from date of policy, travel or reside in any part of the Torrid Zone, or north of the parallel of sixty degrees north latitude; nor engage in military or naval service, blasting, mining, sub-marine labor, aeronautic ascensions, the manufacture, handling or transportation of highly inflammable or explosive substances, or service in any vessel or boat, or railroad service, or in other hazardous occupation.

2. That self-destruction, whether sane or insane, voluntary or involuntary, or death resulting from actual or attempted violation of law, are risks not assumed by the Society within two years from date of policy.

3. That this application, consisting of Part I and Part II, together with the policy hereby applied for, shall constitute the entire contract between the parties hereto.

4. That in any distribution of surplus or apportionment of profits, the principles and methods which may be then adopted by
124 the Society for such distribution or apportionment, and its determination of the amount to be so distributed or apportioned, and of the amount belonging to any policy which may be issued under this application, shall be conclusive upon the assured under said policy and upon all parties having or claiming any interest thereunder.

5. That all provisions of law forbidding any physician who has or shall have attended me from disclosing any and all information which he acquired by such attendance, are hereby waived, and this

waiver is part of the consideration for any policy to be issued hereunder.

6. That no agent of the Society shall have power to make any contract of insurance or to modify or to waive any of the terms and conditions of this application or the policy, or to waive any forfeiture, or to bind the Society by making any promise or by making or receiving any representation or information, or to accept in payment of the first premium under such policy anything except cash.

7. That, as the officers of the Society at the Home Office alone have power to make contracts of insurance, and as they act only on written applications, the Society shall *incur* no liability until this application has been received, approved and a policy issued thereon by the Society, and until such policy has been delivered to me and the premium has been actually paid in cash to and accepted by the Society or its duly authorized agent during my lifetime and good health.

Dated Macon, this 30th day of June, 1905.

(Signed) JOHN ANDREW SALGUE, *Applicant.*

Agent's Certificate.

How long have you known applicant: Three months.
Examined by Dr. R. B. Barron.
On July 1st, 1905.

I certify that I have this day personally questioned the applicant and that I have seen him write his signature as above.

(Signed) J. G. WILSON,
Soliciting Agent.

General Agent: J. R. Nutting & Co.

(Supplementary Questions in case of Women, on reverse side.)

125 *Supplementary Questions on Female Lives to be Answered in All Cases, Without Exception, by the Soliciting Agent.*

1. Name of the woman.
2. If married, state maiden name.
3. Has the woman property in her own right?
4. What is her source of income?
5. Will she pay the premium herself?
6. Is the amount proportionate to her means?
7. If married, give her husband's full name, occupation and address.
8. Is he assured, if so, in what company, for whose benefit, and for what amount?
9. Is she engaged to be married within next two years?
10. Give the motive for the assurance, and also full details of the interest of the beneficiary in the applicant's life.

Dated at —— 190–.

——— ———,
Signature of Soliciting Agent.

126 This Blank is to be Used when Application is for $1,000 or Over.

Application to the Provident Savings Life Assurance Society of New York.

346 Broadway.

Timothy L. Woodruff, President.
Eugene L. Fisk, M. D., Medical Director.

Part II.

Statements to the Medical Examiner.

1. *a.* Full name: 1. *a.* John Andrew Salgue.
b. Race and place of birth: *b.* White, Gallipolis Ohio.
c. Date of birth: *c.* Oct. 28, 1863.
d. Occupation, past and present: *d.* Brickmaker, Superintendent.
2. Is your present and usual health in any way impaired: No.
3. *a.* What is your practice as regards the use of spirits, wines, malt liquors or other stimulants? (State specifically the form, how much and how often.) Don't use at all.
b. Have you ever used them freely, or to the point of intoxication? If yes, give full details stating when to what degree, how often, and how long since last overindulgence. (Question refers to occasional as well as habitual excess, or intoxication.) No.
c. Are you, or have you ever been addicted to the use of opium, morphine, chloral, cocaine, or other narcotic drug? (If yes, give full details as in case of alcoholics.) No.
d. Have you ever taken treatment for alcoholic or narcotic habit? (Particulars required.) No.
4. Have you ever been an inmate of any hospital, asylum, or visited any health resort, travelled, or changed your resi-
127 dence on account of health? (If yes, give dates and details.) No.
5. Have you now or have you ever had any of the following. Answer "yes" or "No" to each. If "Yes" give particulars under 8 below.

Appendicitis: No.
Appoplexy: No.
Asthma: No.
Bronchitis: No.
Cancer or Tumor: No.
Chronic Cough: No.
Delirium Tremens: No.
Diabetes: No.
Disease of Brain: No.

Disease of Ear: No.
Disease of Heart: No.
Disease of Kidneys: No.
Disease of Bladder: No.
Difficult or Frequent Urination: No.
Disease of Liver: No.
Disease of Lungs: No.
Disease of Skin: No.
Disease of Spine: No.
Disease of Stomach: No.
Disease of Bowels: No.
Disease of Sexual Organs: No.
Dizziness or Vertigo: No.
Diarrhœa (Chronic): No.
Dropsy: No.
Dyspepsia: No.
Dysentery: No.
Epilepsy Fits: No.
Gout: No.
Gravel: No.
Gall-stone Colic: No.
Habitual Headache: No.
Hernia: Yes.
If so, do you now and will you always wear a properly fitting truss: Yes.
Insanity: No.
Insomnia: No.
Jaundice: No.
Neuralgia: No.
128 Palpitation: No.
Pain in Chest: No.
Paralysis: No.
Physical Injury: No.
Piles: No.
Pleurisy: No.
Pneumonia: No.
Renal Colic: No.
Rheumatism — Sciatica: No.
Scrofula: No.
Shortness of Breath: No.
Spitting Blood: No.
Sunstroke: No.
Surgical Operation: No.
Syphilis: No.
Tape Worm: No.
Fistula: No.
General Debility: No.
Unconsciousness: No.
Yellow Fever: No.

Give as accurately as possible the following items of Family History, avoiding all vague terms, such as "Childbirth," "Fever," "De-

cline," "Exposure," etc. Fully explain impaired health of living relatives.

6. Father—living; age: 67; How long sick: Don't know. I was away from home; Previous health: Good.
Father's Father—Don't know: Died in France.
Father's Mother—Don't know. Died in France.
Mother—40; Drowned.
Mother's Father—Died old; How long sick: Don't know.
Mother's Mother—Died old; How long sick: Don't know.
How many brothers have you had: Ans. Two.
Age: 23; dead; Boiler Explosion; Previous health: Good.
Age: 26; Killed by fall of R. R. Trestle; Previous health: Good.
How many sisters have you had: Ans. Two.
Age: 28; dead; Contracted consumption; How long sick: 2 mos.; Previous health: Good.
Age: 38; Living; Health: Good.

7. Have you or any of your blood relatives ever attempted suicide or been afflicted with consumption, insanity, cancer, or any hereditary disease? Only sister as above.

129 8. Clinical History—Describe briefly the history of any affection experienced by applicant as per his answers in 5. If more space is required, use that under head of "Special Medical Notes" on reverse side of sheet.
Affection: Hernia.
Date: 1888.
Duration: Still have it.
Severity: Small.
Results:
Name of physician: Dr. who fitted truss I don't remember. Still wear truss.

9. Any serious disease, injury or infirmity other than listed above? (Answer "yes" or "no." If "yes" give full details.) No.

10. Have you been successfully vaccinated? (Answer "vaccinated" or "not vaccinated.") Vaccinated.

11. When and by what physician were you last attended, and for what complaint? March 1905, Dr. Stapler; boils in nose.

12. Give name and address of your usual medical attendant? Dr. J. T. Ross, Macon, Ga.

13. Have you ever applied for or received a pension or sick benefit from any government corporation or society? (If so, state reason therefor.) No.

14. Has any life assurance organization ever postponed, rejected or limited as to amount, form or premium, your application for assurance or restoration of lapsed policy? (Full particulars required.) No.

15. Have you ever been refused for military service? (If "yes" state when and for what reason.) No.

I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made part

of my application for assurance by the Provident Savings
130 Life Assurance Society of New York, and I hereby warrant said answers, as written, to be true, and that I am the person described above and in Part I of this application signed by me.

JOHN ANDREW SALGUÉ.
Person Examined.

Witness:
ROBT B. BARRON, M. D.

Dated this 1st day of July, 1905.

Medical Examiner's Report.

1. *a.* Weight? (Get actual weight, if possible.) 170 lbs.
b. Height? (Take measurements yourself.) 5 ft., 8½ ins.
c. Girth of Chest, under vest, forced expiration? 36 in.
d. Girth of Chest, under vest, forced inspiration? 40 in.
e. Girth of abdomen? 38 in.
f. If under or over weight is this feature an individual or family trait? Neither.
g. Any deformity, maiming or loss of limb? No.
h. Did you weigh and measure applicant: Yes.
i. If not, do you doubt the accuracy of figures given?
j. Has he recently gained or lost weight? (Give particulars as to how much loss or gain, and cause of same.) No.

2. How long have you personally known the applicant? Only at this examination.

3. Is there anything unfavorable in physique or general appearance, delicate aspect, unduly full habit, etc.? No.

4. Is there any lack of acclimation, unfavorable effect from environment, residence, occupation, etc.? No.

131 5. Is it your opinion that any former injury or sickness has affected his constitution unfavorably? No.

6. Have you any reason to doubt the completeness and truthfulness of his statements in Part II as to the use of stimulants? No.

7. Are there any indications of disease or functional derangement of brain or nervous system? No.

8. Is there any serious impairment of sight or hearing? No.

9. Are there any symptoms of disease of the respiratory organs, or any abnormalities of same discoverable by auscultation or percussion? No.

10. *a.* What is the pulse rate? (Full minute. If excited, re-examine until satisfied of normal rate.) 78 and normal.
b. Any intermittance, irregularity, high-tension or undue strength or weakness present? No.
c. Any evidence of Antheroma, Aneurism, or other disease of the blood vessels? No.
d. Any abnormality of heart discoverable by auscultation or percussion? No.

11. *a.* Are there any indications of disease of the digestive organs? No.

b. Any enlargement of liver or spleen or evidence of disease of abdominal organs? No.

12. Any skin eruptions, sores or ulcers? No.

132 13. *a.* Result of urinary analysis? (Satisfy yourself that the specimen furnished is authentic.) Specific gravity, 1022; Albumin, none; Sugar, none; Reaction, acid; Test employed, Heat and nitric acid; Test employed, Fahrangs.

b. Any abnormalities found in the urine except as noted in "A"? If microscopical examination is required, report results on special blank furnished for this purpose, or in separate letter, and attach to this report. None made.

14. Was there anyone present at this examination but yourself and applicant? No.

15. Do you know of anything in the physical condition, past health record, family history, personal history or habits, not already detailed which may affect the risk, unfavorably? (Particulars required.) No.

16. Do you recommend the risk? Yes.

17. Under classification given on opposite page, how do you rate this applicant? (If other than "A" give reasons for lower rating.) "A."

I hereby declare that I have this day carefully examined the above named person, being the same person described in Part I and II of this application; that I have attentively considered the statements made by him therein and have myself written those in Part II, and seen him write his signature thereto. Examined at Town, Macon; State, Ga., the 1st day of July, 1905, at A. M.; 1 P. M. If not Medical Examiner for the Society obtain from agent, Society's Medical Certificate, and forward information requested to Home Office.

(Medical Examiner for Society.)

ROBT B. BARRON, *M. D.*,
Residence, Macon, Ga.

(In red print at bottom of page.)

Space for additional remarks will be found on reverse side of sheet under head of "Special Medical Notes."

In lower right hand corner is written in ink "Previous insurance none."

133 On the left hand margin in red print is "Mail Examination Direct."

When the examination is completed, the Application (Part I), having been read by the Examiner, is to be returned to the Agent, and this paper is not to be shown to anyone but is to be immediately mailed by the Examiner to the Medical Directors at the Home Office. Do not fail to read carefully the other side of this sheet."

On the right hand margin in red print is "Every Question Must Receive an Answer. Ditto marks are not answers. Answers copied from other papers not Accepted.

At the top of the Application has been written in ink "Exhibit B. 1028 '08. E. A. Scott, M. D. Ganard Glenn, Com'r, Thomas J. Purdy, Com'r."

Special Medical Notes. (None Given.)

If Applicant is a woman, the following questions in continuation of Part II, must be answered.

16. Have you now, or have you ever had, any organic disease of the uterus or ovaries, or is any suspected by you?

17. *a.* Is there any irregularity in your menstruation?
b. Has there ever been any irregularity?

18. Are you now, or have you been, affected with any disease of the breast?

19. Have you successfully passed the change of life?

20. Give the date of last menstruation?

21. What is your husband's occupation?

22. How long have you been married? If husband deceased, give date and cause of death.

23. If pregnancy has existed, has any serious trouble occurred during labor? If "yes," give particulars.

134 24. Have you ever miscarried? If so, date, how often, and under what circumstances?

25. *a.* How many children have you had?
b. Date of last confinement with living child at full term?
c. Are you now pregnant?

I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made *made* part of my application for assurance by the Provident Savings Life Assurance Society of New York, and I hereby warrant said answers, as written, to be true and that I am the person described above and in Part I of this application, signed by me.

Person examined.

Witness: —— ——.

—— ——,
Medical Examiner.

Dated this — day of ——, 190–.

In the middle of back page is written in ink these words: "Also following app."

Policy No. 162718.
Exam. Ins. Pol. Ins.
S. T. July 13.
T. D. I.
Amount $—.
Date of policy — day of ——, 190–.
Life of John Andrew Salgue.
Residence, —— ——.

Benefit of —— ——.
Relationship, ——.
Age, —. Date of birth, —— —, 18—.
Kind, —.
Ann. Prem. $—. Form —.
— Equiv. $—
Rem. —.
Recommended for $10000. Med. Dept.
Rec'd July 5, 1905. E. A. S., July 28, 1905.
(Gen'l Agent's card only.) Date, July 6, 1905.
J. B. Nutting & Co. Written 12/1905.
Edition, April, 1905.

On the left hand side of this middle folder is printed, "These spaces are for the exclusive use of the Home Office, and must not be filled or used."

135 On the right hand side of this middle folder is printed, "These spaces are for the exclusive use of the Home Office, and must not be filled or used."

Instructions (Note carefully).

1. Classifications of Risks.—In giving an opinion on life, it is desirable that there should be a uniformity in the expressions used by examining physicians, to enable the Society to understand and appreciate correctly the opinion they intend to convey. It is therefore suggested that there be expressions used for three grades of risks, as Class A, Class B, and Class C, or First-Class, Fair, Doubtful. Class A will embrace all those in good health, who have never had any illness of a character liable to impair the risk, of good physique, good habits and healthy avocations, and of whom there is no cause to suspect any hereditary predisposition to disease. Class B, those who cannot be placed in Class "A" on account of indifferent physique, history of past illness of a character liable to impair the risk, suspected though not well defined hereditary taint, etc., and yet in your opinion are entitled to some form of assurance. Class C will include those who, from any cause are regarded as not assurable—for example, those who have impaired health or distinct hereditary predisposition to pulmonary or other diseases, and those of intemperate habits, or whose environment or occupation are considered hazardous or unhealthful.

2. In reference to the personal use of liquors, such phrases as "temperate," "drink what I want to," "moderately," "occasionally," etc., give no real information, and are worthless for the purpose of this inquiry. The examiner should endeavor to arrive at some approximate idea of the daily habit and by pressing these questions delicately, yet seriously, secure a clear and definite statement on this point.

3. Let the physical examination be thorough and exhaustive, no matter how sound the subject may appear, nor how well you may

know him. For this purpose insist upon such disrobing as in your discretion the circumstances of each case may require.

4. Should you decline to examine an applicant, do not fail to write the fact at once and confidentially to the Medical Directors, giving name, date of birth and the residence of subject, date of application, and reasons for disapproval. This courtesy will be appreciated.

136 5. It is important that the examiner should inform the Medical directors of anything unfavorable in the occupation or immediate environment of the applicant, such as the presence in the same household of an individual suffering from consumption or any other disease or conditions which would constitute a menace to the risk.

6. The medical examiners of this Society are selected and appointed exclusively by the Society's medical department through its own channels. Local agents have no concern whatever in the premises; neither in the procuring of the appointments, nor even in the making of original nominations for vacant examinerships, except by courtesy. Examiners will therefore understand that they are responsible to the medical department only.

For the defendant, The Prudential Insurance Company of America, ROBERT L. BURRAGE, testified by interrogatories as follows:

My name is Robert L. Burrage. My age 50 years. Residence, Newark, New Jersey. I have been medical examiner of the Prudential Insurance Company for 10 years, and the duties of my present position in a general way consist in administering the medical affairs of the Company. The application of John Andrew Salgue was passed upon by me personally, and I approved the same, advising the Company to issue the insurance applied for. I have had an extensive appointance in medical life insurance work, running over a period considerably in excess of 20 years, first as an examiner and in various home office medical positions, assistant medical director, medical director, etc. I presume I am considered an expert in this business. My position would so indicate. I know the custom of life insurance companies in taking applications from parties applying for insurance and the custom in this respect of The Prudential Insurance Company. The object of taking applications by companies is to have distinctly shown a bona fide desire upon the part of an applicant to receive insurance and to obtain from him or her statements covering certain facts and conditions upon which to base the issue of an insurance contract. Insurance companies necessarily place reliance upon statements of applicants and their answers to the inquiries of an application, unless known or demonstrated to be unreliable, and The Prudential Insurance Company in this respect follows the general practice of the business. It is the custom of insurance companies to have applicants for insurance examined

137 by medical examiners before the commission of the Company, and The Prudential Insurance Company follows this custom. Necessarily absolute reliance is placed upon such medical

examination by insurance companies, and the statements and answers of applicants made therein, and this custom is also followed by the Prudential.

The object of life insurance companies in having medical examinations made upon applicants for insurance is to demonstrate whether from the standpoint of health, habits, personal health, history, physique, family history, and other material points, they are insurable under the rules of practice established by the company. And these are the objects in view by the Prudential Insurance Company in requiring its applicants for insurance to be examined. The Prudential does not consider the medical examination of an applicant as a part of the application of such applicant, but the application is never considered alone, but must have for consideration accompanying it the report of a medical examination by a commissioned medical examiner of the company, and it is a fact that its policy of insurance is issued in consideration of application and medical examination side by side. It is the policy of the Prudential in issuing its policy to base such issue upon facts, answers and warranties contained in the application and upon facts with relation to the insurability of an applicant from a medical standpoint in the report of medical examination. The concealment by applicants of material facts relating to health, habits, rejection by other companies, is liable to affect unfavorably the judgment of those passing upon applications, such concealment depriving the company of a full and free consideration of an application from every point of view; and concealment of the fact that other insurance is pending should be looked upon in precisely the same light depriving as it does the company of knowledge as to whether or not applicants in question are seeking over-insurance, or in any way perverting the legitimate function of an insurance transaction. These concealments have precisely the same effect so far as the Prudential is concerned as they would with other companies. J. A. Salgue did apply to the Prudential for insurance. His application and medical examination, the latter made by Dr. W. R. Winchester of Macon, Georgia, was submitted to me. I approved Salgue's application. My action in approving same was taken because of my opinion resulting from an examination of Salgue's application and the report of medical examiner, Dr. W. R. Winchester, that Salgue was under the rules and practice of the Prudential Insurance Company insurable upon the form and for the amount of insurance for which he applied. My approval is in the upper left-hand corner of
138 the original application. The application in question was considered in connection with report of medical examination above referred to before I approved it. The answers, statements, warranties, in the application and medical examination of John Andrew Salgue, made by the said Salgue to The Prudential Insurance Company, had the effect of causing me to approve his application. The policy of the Prudential Insurance Company upon Salgue would not have been issued unless I or some other medical officer of the company had approved the application. At the time this application was approved by me, I did not know, nor did the

Prudential Insurance Company know, or have any information that Salgue in or about 1905 applied to the Penn Mutual Life Insurance Company through Anderson Clark, or that he had been examined for any insurance by Dr. W. J. Little of Macon, Georgia, or Dr. Little had informed Salgue that he had organic heart disease, having a mitral murmur and hypertrophy of the heart with faulty compensation, and that he could not approve his application. I would consider information under questions 4-*b* and 4-*c* of Salgue's application to the Prudential as decidedly material to the risk under consideration, or about to be assumed by the Prudential. The information in question would be material because it would have given the Prudential an opportunity to demonstrate whether or not in its judgment Salgue was a proper subject for insurance, and the concealment of this information deprived the Prudential of demonstrating whether or not under its rules of practice Salgue was a fit risk for insurance or the alternative, if not being able to do so, of declining the application. Neither I personally nor so far as I know any officer of the Prudential Insurance Company at the time of approving Salgue's application and issuing him his policy of insurance had any information that the said Salgue had on June 28, 1905, applied to the Sun Life Insurance Company of Canada for $6,000 of insurance. The Prudential Insurance Company asked question 4-*d* upon its application because it desires the information divulged by answer to this question, wishing to consider the matter of moral hazard, over insurance, and any other pertinent detail with reference to an application. If this man Salgue had an application pending in the Sun Life Insurance Company at the time he made application to the Prudential Insurance Company and the fact had been stated in his application to the Prudential Insurance Company, it would have in all probability had the effect of causing us to inquire further into the merits of his application. I have been practicing medicine and serving in my present capacity for over 30 years. I consider chronic gastritis a serious illness, and consider organic heart disease a serious illness. If Salgue had in
139 answer to question 24 upon medical examination stated that he had chronic gastritis and heart disease it would have resulted in any insurance company refusing the insurance.

Defendant. The Prudential Insurance Company, then introduced the following application for insurance:

Application for Insurance in the Prudential Insurance Company of America.

Approved 7/10/05. R. L. B. 674,931, No
Home Office, Newark, N. J., 1901.
E. K. H.,
Acknowledge letter with pol.

1. *a.* What is your full name?
John Andrew Salgue (Salgue).
b. Where do you reside?

No. 1921, Street, South Macon, City, Macon, County, Bibb; State, Georgia.

c. What is your business address?
C/o Bibb Brick Co.

d. To what post office address are communications to be sent?
Macon, Ga.

2. *a.* Where were you born?
Gallipolis, Ohio.

b. When were you born?
Month, October; Day, 28th; Year, 1863.

c. Age nearest birth-day
42 (43)

d. Are you married?
Yes.

e. Do you intend living or traveling outside the United States (exclusive of its tropical possessions, and Alaska), Canada or Europe? If yes, give particulars.
No.

3. *a.* What is your present occupation, kind of business, position held and length of time so engaged?
Supt. Bibb Brick Co.

b. What other occupations, if any, have you followed, and how long in each?
None.

110 *c.* Do you intend changing your present occupation, if yes, state particulars?
No.

d. Are you now engaged in, or have you any intention of engaging directly or indirectly in the manufacture, sale or handling of malt, or spirituous liquors? Give full particulars.
No.

4. *a.* Are you now insured in this or any other company? Answer yes or no. If so give name of company, amount insured, and kind of policy held. If in this company, give number of policy also.
Yes; name of company, Prudential; No. 34305; amount, $1000; kind of policy, 20 yr.; End't bond. Mutual Life N. Y., $2000; kind of policy, 20 pay life.

4. *b.* Has any company or association ever declined to grant insurance on your life, or issued you a policy of a different kind or for a sum less than that applied for?
Answer yes or no.
No.

c. If yes, give name of company or companies, and when.

d. Is an application for insurance on your life pending at this time in any company? If so give name of company.
Yes. Provident Savings Life.

5. *a.* What kind of policy is desired?
Whole life.

b. What is the dividend period?
Five years.

6. *a.* Sum to be insured?
$5000.00.

b. Is premium to be paid annually, semi-annually, or quarterly? Annually.

c. What amount have you paid in advance or on account?

7. *a.* To whom is the insurance to be paid at your death? My estate.

Full name: ——. Relationship: ——. Present residence: ——.

b. Do you wish the privilege of changing the beneficiary at any time, if the policy or any interest therein be not then assigned? Yes or no, answer.

Yes.

141 I hereby declare and warrant that I am in good health and of sober and temperate habits, and that all the statements and answers to the above questions are complete and true, that the foregoing, together with this declaration, shall constitute the application and become a part of the contract for insurance hereby applied for.

And it is agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in the application.

The applicant will please read answers written after each of above questions before signing.

Signature of the person whose life is to be insured

(Signed) JOHN ANDREW SALGUE.

Witness to signature

(Signed) C. M. ADAMS.

Dated at Macon, Ga., this 6th day of July, 1905.

Be sure that every question is answered in legible writing, and that the date of birth and age are correct.

To be filled in by general, or detached special agent.

Give date on which examination was ordered.—July 6, 1905.

Who secured the above application?—C. M. Adams, General Agent C. M. Adams, located at Macon, Ga.

Received Jul- 8, 1905. Jul- 10, 1905.

For Home Office Use Only.

No. 674,931.
Name, John Andrew Salgue.
Kind, L.
Dividend period, 5 years.
Age, 42; amount, $5000.00.
Premium, $175.20.

Previous Insurance.

No. of policy, 343051, 674932; In force or can. F. kind, 5% Gar., 20-E; amount of policy, $1000; district, E. R. Black; appli-

cation written by C. M. Adams; amount of premium, $81.22; No. of pay'ts made, 4-A; paid to, 4-1-06.

142 Letter.—Amend. etc., acknowledge letter att'y, only one pol. to be placed Dep. app. for correct sig. and age.

Remarks.—Optional with 674932 only one policy to be placed. For form 35 only.

Date, July 10, 1905. O. K. Made out by M. Checked by F. W. Policy written by W. Form 35. M. H. W.

Application ex. for pol. E. M. Pol. Ex. 7-10.

P. R. M. & B. 7-10-G.

If this policy and 674932 are N. T. remit $2.50 Med. fee to Co. If only one is N. T., no charge.

Defendant, The Prudential Insurance Co., then introduced the following medical examination of J. A. Salgue for the Prudential Ins. Co.:

Declaration Made and Signed by the Applicant.

Copy Ex. B.

In the presence of the medical examiner of the Prudential Insurance Company of America:

1. What is your name?
John Andrew Salgue.
2. Residence?
1024 Second Street, South Macon, Ga.
3. Do you intend living or traveling outside the United States exclusive of its tropical possessions and Alaska), Canada or Europe? If yes, give particulars.
No.
4. What is your present occupation, kind of business, position held, and length of time so engaged?
About 5 years. Supt. Bibb Brick Mfg. Co.
5. Do you intend changing your present occupation?
No.
6. What other occupations have you followed, and how long in each?
Always brick yard work.
7. Have you ever been engaged in, or have you any intention of engaging in the manufacture, sale or handling of malt or spirituous liquors?
No.
8. Date of birth?
Day, 28th; month, October; year, 1863.
9. Place of birth?
Indianapolis, Ohio.
10. Have you ever used malt or spirituous liquors to excess? If so, give full information.
No.

11. State the quantity you use each day of malt liquors.—Never drank any in my life.

Wines?—None.

Spirits?—None.

Nor used tobacco?—None.

12. Have you ever used opium?—No.

Chloral?—No.

Or any narcotic?—No.

13. Has your application for insurance ever been rejected, postponed or modified by an insurance company, assessment society or benevolent order?

No.

When? ——.

By what company, society or order? ——.

Policy now pending with Provident Savings. Less than a week ago applied.

(Application continued.)

14. Have you ever received a severe injury; when; nature of injury; how long disabled?

No.

15. Have you undergone a surgical operation; when; for what was operation performed; result?

No.

16. Are you in good health?

Yes.

144 17. When were you last attended by a physician?

Early spring of 1905.

For what complaint?

Bilious fever. (?) For two days.

18. Has your weight changed within one year? How much gain or loss? What cause?

Same for many years.

19. Have you ever sought or been advised to seek change of climate for your health?

No.

20. How long have you lived in city or town in which you now reside?

5 years.

21. Has either of your paternal or maternal grand-parents died of consumption, insanity, or any other heredity disease?

No.

22. Family Record.—Father, cause of death, don't know; age, Ab't 57; how long sick, don't know; previous health, good; mother, drowned; age, 42; how long sick, not at all; previous health, good; brothers (2) both accidentally killed; ages, 21 and 26; how long sick not at all; previous health, good. Sisters (2), one, age 33, health, good; other cause of death consumption; age, 26; sick three months; previous health, good.

The examiner will use this space to give full information concerning any declaration the applicant may make.

22. Father lived in Ohio and applicant was living in Philadelphia at the time of his death and only knows that his father (who lived in his house alone) was found dead. Sister took "cold" at a dance when in perfect health, and inside of three months was dead. One brother was killed by exploding boiler and the other from a falling trestle.

23. Have you ever had (answer yes or no to each)—Asthma, no; habitual cough, no; spitting of blood, no; dizziness, no; epilepsy, no; habitual headache, no; loss of consciousness; no; insanity, no; paralysis, no; persistent neuralgia, no; sunstroke, no; gout, no; acute rheumatism, no; chronic rheumatism, yes; palpitation of heart, no; syphilis, no; discharge from ear, no; chronic diarrhœa, no; kidney or bladder disease, no; renal or hepatic calculus, no; fistula, no; appendicitis, no; stricture, no; tumor or cancer, no; dyspepsia, no.

145 Questions to — answered if applicant is a woman ——.

I hereby warrant that the answers to these questions are true, and agree that they shall form a part of the contract for insurance applied.

Dated this 6th day of July, 1905.

JOHN A. SALGUE.
Applicant's signature.

Medical Examiner's Report.

A. By what means are you satisfied as to the identity of the party you are about to examine?

Know him personally.

B. Were the answers recorded above made and signed by the applicant in your presence?

Yes.

C. Do you believe that applicant is over that age given to you? If yes, at what age would advise issue of policy?

No.

D. Have you reason to suspect intemperate habits, or if female, immoral life?

No.

E. Have you any reason to doubt any statement made by applicant to you?

No.

F. Describe the duties of applicant's occupation, stating line of business.

Manager of Brick Mfg. Co.

G. Race (white or colored)?

White.

H. Sex.

Male.

I. Is sight good?
Yes.
146 J. Is hearing good?
Yes.
K. Is appearance healthy?
Healthy.

The following questions are to be answered only after a physical examination of applicant, and chemical examination of urine:

L. Rate of pulse per minute?
76.
M. Does it intermit? No.
Irregular?—No.
N. Temperature (under tongue)?
98, 22 3/5.
O. Height?—5 ft. 8½ in.
Weight?—168 pounds.
P. Measurements of chest?—39.
Of waist?—36½.
Q. Do you find any indications of disease of heart or blood vessels? If yes, give particulars.
No.
R. Do you find any indications of disease of respiratory organs? If yes, give particulars.
No.
S. Do you find indications of disease of nervous system? If yes, give particulars.
No.
T. Do you find indications of disease of abdominal or pelvic organs? If yes, give particulars.
No.
U. Analysis of urine:
Reaction?—Neutral.
Specific gravity?—1023.
Albumin?—None.
Sugar?—None.
147 V. Are you sure urine examined was passed by applicant?
Yes.
W. When did you make examination on which above report is based?
6th day of July, 1905.
X. Where was this examination made?
In my office.
Y. Do you find applicant free from physical and mental defect and in good health?
Yes.
Z. Is the risk first class, fair, average or poor?
First class.

This space to be used for necessary remarks and for comment upon the moral hazard involved.

In the winter of 1898 had some pain (no swelling) in joints, more or less, for about three months—not laid up and followed his work—no return. V. s. g. little high from free perspiration—a very warm day. Moral hazard all right.

I certify that the above statements are true.

(Signed) W. R. WINCHESTER,
Medical Examiner, Macon, Ga.

To be filled in by the examiner:

Application received July 6, 1905; application and report mailed to home office July 6, 1905.

J. G. WILSON, sworn for the defendants, testified as follows:

Direct examination.

By Mr. BLACK:

In June, 1905, I was agent for the Provident Savings Life. Yes sir; I took that application of John Andrew Salgue in the Provident Savings Life. Yes sir; the questions on this application were asked Mr. Salgue, and those answers were written on the application. Yes sir; this question was asked him: "Has any life insurance organization ever postponed, rejected or limited your application for insurance, or restoration of elapsed policy, full particulars required;" and he gave the answer, no, as indicated to it. Yes sir; this
148 question was asked him: "Are you negotiating for life insurance? If so, state in what organizations, and for what amount?" His answer was "No." Yes sir; the policy applied for under this application was issued. Yes sir; it was sent to me or to the general agent, Mr. Ross; Mr. Ross and myself went out to deliver the policy together. No sir, we did not deliver it; he refused to take the policy. No; he did not state for what reason, at the time, only said he was going to take out some more insurance, and he just didn't want it; that was all there was to it. No; he didn't give us any reasons for not taking our policy. No sir; I did not have a talk out at the Brick Company with anybody else besides Mr. Salgue. As to how I happened to write this insurance on Mr. Salgue, it was my sister or brother told me his wife told them Mr. Salgue was going to take out some insurance, and I went out there to see him.

Cross-examination.

By Mr. WIMBERLY:

As to whether I got out there on June 30th, the date of the application was the day. Yes sir; that was the time he told me he was not negotiating for any other insurance. I don't remember the date I went out there with the policy to deliver it. I can't remember how long it was after June 30th; Mr. Ross and I went together, Mr. H. C. Ross; he was the general agent; I was under his supervision. Yes sir, in order to be sure and write him, I took the general agent out there with me. As to whether I persuaded him to make the appli-

cation. Mr. Ross did most of the talking. Yes sir; he finally gave the application. Yes sir; I then went out there with Mr. Ross, and tried to get him to take it. No; I don't remember that he told us that he didn't want it, he had written more insurance on him than he wanted, and he declined to take it; Mr. Ross is the man that tried to deliver the policy. Yes sir; I was along; I had only been in the insurance business a short time, and he was the man doing the soliciting. Yes sir; I know Mr. Ross tried to get him to take the policy, and he declined. No sir; he couldn't get him to take it. Yes sir; it was a policy for five thousand dollars. We offered it to him, and tried to get him to take it, and he would not take it. No sir; I did not take any more out than this; five thousand dollars was all that was written at that time. We only took out one policy. No sir; we didn't do like these others, take two policies; we only took one policy.

B. H. Ray, sworn for the defendants, testified as follows

149 Direct examination.

By Judge Miller:

Yes, sir; I was soliciting agent for the Aetna Insurance Company in June and July, 1905. As to whether I wrote the policy upon the life of Mr. John A. Salgue, I wrote the application for insurance. Yes sir; it resulted in a policy. As to how I came to go to Mr. Salgue on or about the 6th or 7th of July, Mr. W. E. Hawkins, Manager of the Aetna Insurance Company for Georgia, took the train at 8:15, going to Forsyth. On the train, I met Mr. John T. Moore and his wife. After talking to them in the ladies' car, Mr. Moore went in the smoker and I went in there where Mr. Hawkins was, and introduced Mr. Moore to Mr. Hawkins, and we naturally engaged in conversation about insurance. Mr. Moore says: "Bolivar, if you will go out to my brick plant, I will introduce you to Mr. Salgue, my superintendent, he is figuring on some insurance;" and I thanked him, and on the night of the 7th, Mr. Hawkins and I returned here, and on the morning of the 8th, I went out there and wrote him. Yes sir; this is the original application; this is my handwriting. Yes sir; I asked the questions, and wrote them, and I read them all over to Mr. Salgue, as I do in every case, usually. I read him those questions that are propounded, every question to him, and he answered them, and I put them down as he answered them. Yes sir; I asked Question 16: "Has any proposal or application to insure your life been made to any company, association or agent, on which a policy of insurance is now pending? or has any such proposal or application ever been made for which insurance has not been granted, or on which a policy or certificate of insurance was not issued for the full amount, and of the same kind as applied for? If so, state particulars, and the names of all such companies, associations or agents?" And I wrote the answer that is written there "None." Yes sir; I read him question No. 18: "Has any company or association in which your life has ever been insured, or the agent thereof, expressed an opinion that the risk was undesirable, or refuse

to reinstate any such insurance after it had lapsed? If so, state particulars, and the names of all such companies, associations or agents:" and wrote his answer to it. Yes sir: he answered "No." Yes sir: he answered the 19th question: "Has any physician expressed an unfavorable opinion upon your life with reference to life insurance? If so, state particulars." Yes sir: I read question 17 to him: "What amounts are now insured on your life, and in what companies or associations? If insured in this Company, state the number and amount of each and every policy." Yes sir: he answered two thousand dollars, Prudential, and two thousand dollars, Mutual Life, and I wrote it down. Yes sir: that is his signature to the application, witnessed by myself and Mr. Hawkins. Yes sir: those are our signatures.

Cross-examination.

By Mr. WIMBERLY:

When I wrote this application, Mr. John T. Moore, Mr. Salgue, who signed the application, Mr. W. E. Hawkins and myself, were in the office together. No one else was there, that I remember of. No sir: Mr. Woodruff was not there: I never met any gentleman by such a name. Mr. Hawkins was the State Manager. No sir: Mr. Hawkins didn't generally go with me when I wrote insurance: Mr. Hawkins goes with me a good many times on trips, not always, but he was with me on a three days' trip on that occasion, and we went out that day to the Bibb Brick Company. We had been over to Monroe County. I was out there one time in connection with this transaction. No sir: I was not out there when the policy was delivered: I never had anything to do with it after I took the application, and the settlement for it. Mr. Hawkins handled the matter from then on. No sir: it is not a fact that on this occasion, when I wrote this application, Mr. Salgue told me that he was thinking about taking out some insurance on his life, and would make the application with the understanding that after he saw the different policies, he could select those he wanted. Mr. Moore told me on the train Mr. Salgue was considering taking some insurance, and if I would go out there, he would introduce me to Mr. Salgue. I went out there, and Mr. Moore kindly introduced me to Mr. Salgue. I figured with him, and told him I could give him six thousand dollars non participating policy, and he made this remark: "That gives me six thousand dollars insurance, and Mr. Adams five thousand dollars, and there is little difference in my favor." I figured with him, and told him that there was $9.80, is my recollection, and then I took his application there. Mr. Adams was C. M. Adams, Manager for the Prudential. No sir: Mr. Salgue did not say that he had applied to Mr. Adams, but that mine was cheaper, and that he would apply to me, and if he liked mine as well he would take mine. I got a settlement for it then and there. When I was writing his application, Mr. Hawkins engaged in conversation with him, did he want to put his insurance in force as soon as the policy was issued, and he said he did. He said "Ray, you draw the note: I will draw the binding receipt."

151 I was sitting at the table where I was doing the writing of this application. I then took a settlement for it, and Mr. Hawkins drew the binding receipt on Mr. Moore's desk, and that was the last of my connection with it. The note was payable to W. E. Hawkins. As to what occurred at that time, I wrote Mr. Salgue that six thousand dollars insurance in good faith, I thought he bought it in good faith, and he paid for it in good faith. That was the last I had to do with it. There was no thinking about it with me. I don't know what he thought. As to why it was, when I knew he had applied for five thousand dollars to Mr. Adams' Company, I did not make mention of that fact when I filled out his answers, he did not tell me he had applied to Mr. Adams; he said my figures on six thousand dollars was a little cheaper than Mr. Adams' on five thousand dollars. It was a participating policy. As to whether I said just now that he told me he had applied to Mr. Adams, the way I intended it was that he was figuring with Mr. Adams. No sir; it is not a fact that, in answer to this application about having made application and no physician expressed an unfavorable opinion, that Mr. Salgue said to me: "Dr. Little says I have got heart disease, but I don't believe I have got it, and that he struck his muscle on his arm, and said: "I am a perfectly sound man," or words to that effect. No sir; I didn't say: "That can be very easily settled, I will get the Company's physician, and he will say." I never engaged in any conversation with him about that. Mr. Hawkins did; Mr. Salgue remarked, something was said, I don't remember that he named any physician, someone said he had heart trouble, Mr. Hawkins said that was a matter for the physician to pass upon. That conversation occurred in my presence. I had written the application at the time, and had telephoned for Dr. Barron, I could not reach Dr. Barron, and then I telephoned for Dr. Harrold; I did not know Dr. Harrold was appointed until that morning. Yes sir; I had written it at the time, but I was still there with him, with it in my hand. Yes sir; Mr. Hawkins was with me. I never left the office with that application, at all. When I took the application, I turned it over to Dr. Harrold in the presence of Mr. Salgue, and he concluded his part of it there. Mr. Hawkins and I were there when Mr. Salgue said someone said he had heart trouble; he didn't say Dr. Little. Yes sir; Mr. Hawkins said that was a matter for the physician. That was the only thing that occurred in my presence about it. Yes sir; Mr. Hawkins, to whom that was said, is State Manager of that Company. That conversation occurred right there, after I had taken the application.

152 This page and following 3 pages comprise the medical examination of John A. Salgue to Aetna Life Insurance Co., introduced with original application of Salgue to said Company for insurance.

Examination must be made by the regularly appointed physician of the Aetna Life Insurance Company.

The medical examiner is requested to be very minute in his examination to answer each question fully, and to write the result of the

examination himself. During the examination neither the agent nor any third person should be present.

Examination of Mr. John Andrew Salgue.

Examined at Macon, Ga., the 8th Day of July, 1905.

1. How long have you known this applicant?
One day.
2. General appearance and apparent age?
39. Race, white.
3. State the height?
5 ft., 8½ in.
Weight?
167.
Chest measurement on full inspiration?
40 in.
Chest measurement at forced expiration?
36 in.
Measure of abdomen?
35 in.
4. Are there or have there ever been any signs of apoplexy, paralysis, epilepsy, insanity, or any nervous affection or pre-disposition thereto?
No.
5. Has the applicant ever had scrofula, rheumatism, gout, or dropsy?
Rheumatism, as above.
6. What is the character of the respiration? Is it full, easy, gentle regular, healthy, and to be heard over both lungs.
Full and easy and free. O. K.
7. Has the applicant a cough, occasional or habitual or occasional or uniform difficulty in breathing?
153 8. Is the heart's action uniform, free and unobstructed and has it always been so?
Yes.
9. Does auscultation indicate enlargement or disease of the heart of any kind?
No.
10. State the rate and other qualities of the pulse?
Good force—75 in minute.
11. Does percussion or auscultation indicate disease in any part of the viscera of the chest?
No.
12. Is there any abdominal disease externally or internally? Have any of the abdominal viscera been diseased?
No—save—
13. Has the applicant any bodily malformation lost a limb or suffered from mechanical injury, or disease of any kind?
No.
14. Is there rupture? In your opinion is a truss necessary?
Yes—Truss not necessary, but is worn.

15. Is there any impairment of sight or hearing?
No.
16. Is there evidence of successful vaccination?
Yes.

An examination of the urine is necessary in every case, and the urine must be passed in the presence of the medical examiner except that if the applicant is a woman, examiner may certify that he is satisfied the specimen is genuine.

1. Was the urine examined passed by the applicant in your presence?
Yes.
2. What date was it passed?
July 8th, 1905.
154 3. Color?
Straw.
Acid or alkaline?
Alkaline.
Specific gravity?
1024.
4. Albumen?
No.
Sugar?
No.
5. Does the applicant rise at night to urinate?
No.
6. Are the functions of the kidney and bladder healthy?
Yes.
17. Has the applicant during the past five years, lived in the same house with any one suffering from consumption? If so, state the particulars.
No.
18. As a result of your examination, do you believe that this applicant is an habitual user of any form of alcoholic stimulants?
No.
19. Opinion of life, and prospect of longevity?
Excellent.
20. Do you consider the applicant safely insurable?
Yes.
21. What is the amount of insurance now applied for?
Six thousand.

CHARLES HARROLD, M. D.,
Examining Physician.

Physician—Where graduated: College of Physicians and Surgeons.
When graduated: 1902.

27. Sister who died of phthisis did not live in same house as brother for three years preceding her death, which was about '98. She then lived in Philadelphia; was in perfect health until three months before her death. Living sister in good health—
155 married and has several children.

14. Regarding his hernias left extremely right—only ob-

served after marked intentional cough or strain; right slightly larger on coughing but does not form external ring. Truss not necessary but worn.

C. C. HARROLD, *M. D.*

W. E. HAWKINS, sworn for the defendants, testified as follows:

Direct examination.

By Judge MILLER:

In 1905, I was State Manager of the Aetna Insurance Company. Yes sir; I was present on July 8th, when this application was filled out by Mr. Ray for Mr. John A. Salgue. As to what time of day that was, I think we left the Brown house about nine o'clock in the morning, and went out between nine and ten o'clock when we got there. Yes sir; it was between nine and ten o'clock when we got to the Brick Company's office. Yes sir; the conversation took place in the office. As to what time I think Dr. Harrold got out there, I am sure we were there about an hour before he came, probably an hour or a little more; he was telephoned for, and came out in a few minutes. Yes sir; this is my signature; this application was filled out by Mr. Ray. I filled out the second part, "Questions to be answered by the agent," Form No. 66, at the bottom there. Yes sir; that is my signature at the bottom there. Yes sir; I have examined this paper before. As to the conversation that occurred between Mr. Salgue and myself, I only had a very little conversation with Mr. Salgue. Mr. Ray did most of the talking to him. About the first thing I said to him when the application had been written, I asked him if he wished to put the insurance in force as soon as the policy was issued; I explained to him how it could be done, and he stated he did, and I requested Mr. Ray to write out the note while I wrote what is known as a binding receipt, that is, as soon as the policy is issued at the Home Office, it is in full force. And that was about all that was said. As to what he answered, he said yes sir, he wanted to put it in full force, and he signed the note, and I handed him the binding receipt, and explained to him what it meant after the policy was issued, that was the same as the policy until received by him, and requested him to put it in his insurance papers. As to his statement, if any, concerning the previous condition of his health, when this matter was closed up, as I remember, he stated that one doctor said to him he had heart trouble, and I told him I was not
156 competent to pass on that question, our Examiner could tell him more about that than I could, and it was left with him. Yes sir; that was the substance of what passed on that answer. Yes sir; this paper is practically a copy of the binding receipt, except one point I am not sure of, when I took his note, it was practically a cash settlement. Mr. John T. Moore said he would send me a check on the Company as soon as the policy was received, so we took the note due a few days after that day. I think it was due thirty days from date; I don't remember exactly about that; it was only a short time note. The note was originally given for $175.80, but after re-

turning to Atlanta, and after looking at his age, we found him to be a year younger, and we made that correction, so the final premium was $169.00 and something, I believe. As to what became of the note, I took it back to Atlanta with me, and on July 20th, mailed it to Mr. John T. Moore, together with the policy, and requested him to deliver this policy and let me have a remittance for the note, which he did remit to me on August 1st. Yes sir; I got the money from Mr. Moore; the check, I think, was signed by the Bibb Brick Company, by the President, and the letter was written by him individually. As to whether I delivered the policy to him, I mailed it to Mr. John T. Moore. Yes sir; the binding receipt was left with Mr. Salgue. As to whether his note was returned when it was paid, I mailed the note to Mr. Moore with the policy; he was acting in the capacity, we treated him as a collecting agency. Yes sir; we sent the note and got a check for it. No sir; I have never seen the note since. As to the value of that binding receipt to Mr. Salgue, the receipt was dated July 8th, but the policy was not issued until July 15th, and the conditions of that receipt are that the policy shall go into force immediately upon being issued, which was July 15th, had any accident happened to him, and he been killed between that date and the time he received the policy, July 21st, it would have been in full force. That is what the binding receipt means; the man is given a settlement in advance; the policy goes into effect as soon as it is approved and issued at the Home Office. As to what the relation of Mr. Salgue to the Company would have been if the policy had been issued at the Home Office, and there had been for some reason a delay of some weeks, he would have been fully insured from the date of the policy at the Home Office.

Cross-examination.

By Mr. WIMBERLY

At that time, I was State Manager for Georgia for the Aetna Life Insurance Company. Yes sir; I was State Manager at the
157 time of this transaction. I have been State Manager seven or eight years, seven years, I believe. Yes sir; I did, as Manager of the Aetna Life Insurance Company, write Mr. Salgue this letter dated August 2nd. Yes sir; at the time this application was written, I was present. No sir; I did not pay any special attention to the answer made by Mr. Salgue to Mr. Ray; I merely attested his signature, and saw him sign it. Occasionally, I as Manager, go with the agent that writes insurance. Yes sir; I go with the agent occasionally to assist him in landing the insurance, when I think there is going to be difficulty in cutting out out some other company trying to get a man. As to whether I knew, in this particular case, that there were a number of life insurance companies after Mr. Salgue, to write insurance on his life, he mentioned that several had approached him for insurance. As to whether he said he had made application to several, and he was willing to make application to us, and let him decide when they got there which he wanted, he said so in the beginning; we did not close it that way, though; that was not

his conclusion in the end. He did not say in the beginning that he had made application, but that he was figuring; several had approached him, he said. As to whether he said he had made application to them, and he would make application to us and then decide when he got the policies which he liked, he asked us if we were willing to do that, and we went on to explain our policy. He asked us whether we would be willing to bring out our policy on those conditions, on the condition that it would be decided on after they were all issued, and I told him we preferred to have the matter settled while we were issuing it, we had confidence enough in our policy, that it would be just as represented in every way. We did not finally, after he asked us if we were willing to do that, wind up by giving him a binding receipt and taking his note, until he had said positively that he would take our policy. As to whether it is usual, in cases we call a cash settlement where the money is paid, in delivering the policy to take a note, or, at the time of issuing the binding receipt for the party to give us a check, we have to do both ways; we expect the cash on the delivery of the policy; we usually take the note so as to have ten or twenty days; occasionally, it is on delivery of the policy. As to whether we usually take a check where it is a cash settlement, we nearly always take a short time note, ten or fifteen days, which is simply to close the matter. No sir; between the time Mr. Salgue applied and the time the Company might pass on it, whether it was a week or a month, he had no insurance. No, he was not bound all the time to take it, unless the Company
158 issued it. No; he had no way of getting out if the policy was issued; that was given with the idea if the policy was issued. As to whether it was the Company's option, and not his option, it was always the Company's option to decide on the application. As to how long it was before I received the check, when I sent the policy out to Mr. Moore with the note, I received the check on August 2d. I mailed it to Mr. Moore on July 19th; I addressed the letter to John F. Holmes, through mistake; I discovered that on July 20th, and I wrote him that I had requested the post office to hand him that letter, and at the same time handed him Mr. Salgue's note. I do not recall getting but one letter from Mr. Moore; that was the letter enclosing the check. Yes sir; I have got the letter. Yes sir; I will let you see it. Yes sir; it was on receipt of this letter that I wrote the letter to Mr. Salgue, that letter of 8 and 2. I do not recall a letter before that, from Mr. Moore to me; I have no record of it. No sir; if there was such a letter written, I haven't it now; if I ever received it, I do not recall it, and I haven't it in my files. No sir; Mr. Salgue did not tell me who the doctor was that had told him he had heart disease, at the time this insurance was written. No sir; I did not ask him who the doctor was. We frequently have men tell us this fellow thinks he has kidney trouble, and unless he impresses it strongly in our minds, we turn him over to the doctor. As to whether we pay very little attention to what men tell us about heart trouble and things of that sort, and that is a thing the physician can tell, if he says he has had such things and says doctors have treated him, then we ask more specifically about it. No sir; I did not hear Mr. Salgue

when he told Mr. Bolivar Ray, at the time this application was written, that Dr. Little refused to pass him because he had heart disease. I was there when Dr. Harrold came in, and he took him into the adjoining room, where he made the physical examination. No; it is not true that, when Dr. Harrold arrived, Mr. Salgue told Dr. Harrold that Dr. Little had refused to pass him because he had heart disease, and Dr. Harrold said: "I will settle that right now." He did not mention Dr. Little's name. The only thing, I think we both called Dr. Harrold's attention to the fact that someone said he had heart trouble; yes sir; that a doctor said he had heart trouble. No; I don't think Dr. Harrold asked him what doctor it was. As to whether Dr. Harrold said, when he told him that: "I will settle that by examining him," I don't remember the words, that he would look into it and find out what the trouble was. As to whether Dr. Harrold said, when he got through examining him: "I will stake my professional reputation as a doctor on his not having heart disease," I
159 don't recall the doctor's exact language, but he said when he came out, he found no trouble with his heart. Yes sir, I know Dr. Harrold; I was raised in the same town with him, in Americus. As to whether I know that there is no more competent physician in the State than Dr. Harrold, I regard him very highly.

By Judge MILLER:

Yes sir; this is the same form of binding receipt we were using at the time we took Mr. Salgue's application. As to whether there are any changes between the paper I hold in my hand and the original receipt, I am positive about the part filled in, except the due date of the note, whether that was ten days or thirty days. We did not recall the receipt after the issue of the policy; there is no value after that.

Dr. C. C. HARROLD, sworn for the defendants, testified as follows:

Direct examination.

By Judge MILLER:

As to the extent of my professional equipment, how long I studied medicine, and what I have done since, I studied at the P. & S., New York, physician and surgeon, and was in the hospital there for eighteen months. I came here a few months after that, and have been here since May, 1904. Yes, sir; I have been in actual general practice in the hospital and in the City of Macon since 1902. No, I am not a specialist. Yes, sir; I was one of the medical examiners for the Aetna Company in 1905. Yes, sir; I examined Mr. John A. Salgue. As to the time of day, it was in the forenoon; I do not remember the exact time; I know it was before lunch, and it was in the heat of the day. Yes, sir; I was called down there. The examination took place in the two offices of the brick company, the first part of the examination in the front office, and the physical in the room in the back. Yes, sir; this is Salgue's signature, signed to this sheet. Yes, sir; it was signed in my presence; I witnessed it. Above his signature, that represents the questions asked by me of the witness, and the answers written down by me. Yes, sir; the questions

were actually asked and the answers written down. No, sir; there was no general conversation, and then I wrote out the answers; each question was asked and the answer written separately. As to whether I asked Question No. 21, "Have you ever had any of the following diseases? Answer yes or no, opposite each; if yes, state the date, duration and severity of illness," and after naming a number, among them is "Disease of the heart," and to that question got the answer, "No;" I asked the question, and then there was a discussion
160 after the question, and then at the end of it I put the answer, "No." As to what the discussion was, I asked him if he had heart disease, and he said he thought he did not; he had been told that he had, but he had no symptoms of heart disease and he thought he did not have it. I went into it closely with him and asked him the symptoms a person would have who had heart disease; he said he had none of them and he had never been treated for heart trouble, so I then put down that answer, "No," and then went into the physical examination later on. As to whether I asked him in the course of that conversation the names of the doctors that had told him, he told me either Dr. Winchester or Dr. Little. I don't remember which he said—one of those doctors told him he had heart disease and scared him so, and the other one told him he did not have heart disease nor any signs of it. Those were the two he mentioned—Dr. Little and Dr. Winchester; I do not remember which he said told him he had it and which did not. No; he did not name McAfee. As to whether the date on this paper is correct—8th day of July—that is in my handwriting; I suppose it is the proper date; I don't remember the date. I would not know whether the date of this examination and these answers was the 8th day of July, 1905, except for the fact that it is written there; I think it is right; it is in my handwriting. Yes, sir; my recollection is that I asked him the 24th question, "Have you had, during the last seven years, any disease or severe sickness? If so, state the particulars of each case, and the name of the attending physician," and got the answer, "No." Yes, sir; that is my handwriting; I asked him and he answered, "No." Yes, sir; the lower list of questions are questions addressed to me by the company and answered by me—the physical examination. Yes, sir; the heading, "Examination of Mr John Andrew Salgue, examined at Macon, Ga., July 8, 1905," is all in my writing and signed by me. Yes, sir; I wrote the answer, "Excellent," to No. 19 in my statement as Examiner, in reply to the question, opinion of the life and prospect of longevity. Yes, sir; I answered, "Yes," to Question 20, "Do you consider the applicant safely insurable?" As to whether in the conversation between Mr. Salgue and myself, he mentioned only two doctors—Dr. Winchester and Dr. Little; I am under the impression he mentioned Dr. Ross as having treated him for something a number of years previously. As to whether that was the malarial attack I have forgotten which it was; he said he had completely recovered. No, sir; I have not looked carefully over the previous report. As to whether I did at the time read that where Dr. Ross's name appears, I very often do not look over the previous paper at all; I don't think I

did. As to whether, in our conversation, he referred to Dr.
161 Ross as having treated him for any serious trouble, my recollection is he referred to Dr. Ross as having treated him for something several [years] previous, but he had completely recovered. Yes, sir; I am sure that, as to the other two men, one told him he had heart trouble and he went to the other and he told him he did not; I don't know that he went at once; he went because he was frightened. No, sir; he did not say the same day. No; I can't recall which one told him he had heart trouble and which one told him he did not. Yes, sir; after the talk with Salgue about the alleged heart trouble, and after this about the serious diseases, to which he answered "No," when I completed the writing of his answers, I then took him into the back room to make the physical examination. As to what that physical examination consisted of, how I prepared him, I stripped him to the waist and went through the regular form that is laid down in the application there. I don't remember which comes first, the counting of the pulse, or the respiration or taking his measurement. First comes his apparent age; I looked at him and judged that; then comes his measurements; I took those and asked him what his weight was; I did not have any scales there, and a long list of questions here concerning the appearance of the person, I asked him about those, and then comes the examination of the heart, which I made with the stethoscope, listening to the action of the heart and listening to his breathing. I went through all of those, and then the rate of his pulse. The question is asked, if I found anything wrong with his chest. I answered, "No." And then the question about the abdomen. I made an examination of him, and found he had a double hernia; he was wearing a truss. As to how thoroughly the heart examination was made and what conclusion I reached about it, I went through it as carefully as I could, and found there was nothing wrong. I examined him first with my stethoscope, listening to the action of the heart. I remember the light was not very good in the room, and I carried him over to the window. I remember there was a box by the window, so I could not get close to it, and he moved the box to the other side of the room so I could get near the window, and I examined him there with plenty of light as carefully as I could. My recollection is, the room was about eighteen or twenty feet square. And I found nothing wrong with his heart, with its action, and I did not find any murmurs, and I did not find it was displaced; I did not find his pulse was too rapid; I found nothing wrong with his heart. As to whether it is possible that a man can be examined one day for trouble of that character, a mitral murmur, and it be distinctly apparent today, and at another time it would not be detected, it should be apparent; it can be much more apparent at one time than
162 another, but if the murmur is due to a lesion of the valves, then it should be apparent at all times; if the murmur is due to a weakening of the heart muscle, then it may be very well apparent at one time and not apparent at another, or if the murmur is due to anemia, if the anemia is clogged up, then the murmur should cease. As to whether, under the conditions stated, it might be apparent and without those conditions it would not be apparent, if it is

a valvular trouble, a distinct valvular lesion, it should be apparent at all times, but more apparent some times than others.

By the Court

No, sir; a mitral murmur does not necessarily result from a lesion of the valves; it can result from a weakness of the heart muscles.

By Judge Miller

My impression is that term "Mitral murmur" is from the cardinal's hat—it looks like a cardinal's hat; I believe it is a bishop and not a cardinal. No, sir; I did not, during the conversation with Mr. Salgue either in or out of the office or in the room, as to the condition of his heart or his previous health, get any information from him or impression from him that he had applied for life insurance and been turned down. No, sir; he did not tell me that this information the doctors had given him and which he conveyed to me, was while he was being examined for life insurance. No, sir; I do not remember his mentioning the time at all when those things had been said to him. As to whether, when he mentioned Dr. Little's name, anything was said about Little being examiner for the Penn Mutual, nothing was said about the doctors with reference to insurance at all. No, sir; no allusion was made by him to the continuous treatment for several months by Dr. McAfee; he never mentioned Dr. McAfee's name at all to me. No, sir; he didn't mention any continuous treatment by any doctor. As to whether there was any reference to any treatment other than the slight treatment by Dr. James Ross, he mentioned subacute rheumatism, as having had subacute rheumatism several years before, from which he had completely recovered. I do not remember who the doctor was. The question is, "Have you had inflammatory rheumatism? If so, when, and how often?" The answer is "Light subacute attack several years ago; no return." I don't remember what he said about the doctors, if anything at all. I don't remember whether he said whether he had any treatment for it; he said he had no return of it. His appearance was that of a very strong and physically perfect man, quite well developed. Yes, sir; he
163 had a deep chest. Yes, sir; a man could have that appearance and with that appearance have an organic disease of the heart that would escape attention, the beginning of an organic disease of the heart. Understand me, I said before I think it should not have escaped attention, but it could do it. Yes, sir; with all of his appearance, he might have an organic affection of the heart which would necessarily result fatally in later years and that escape attention, if he lived long enough for it to kill him. Yes, sir; he could have an affection from which he could not recover. No, sir; if I had known at the time that I signed at the bottom of the sheet that I considered the application safely insurable, that he had been treated by Dr. McAfee for chronic gastritis from January up to the date of my examination, which treatment required the washing out of his stomach, and constant calls, either by the patient on the doctor or the doctor at the patient's house during that period of time, I would not have recommended him. Yes, sir; I would term that condition

you have described of chronic gastritis as treated by Dr. McAfee, a condition from which a man suffers. No, sir; if I had known at the same date that before the 19th of June, 1905, Dr. W. J. Little had examined this man for the Penn Mutual for the purpose of insurance in that company and turned him down, refused to recommend him as an insurable risk because of the condition of his heart, I would not have recommended him for insurance in the shape I recommended him there; I would have recommended that he be held up and watched. No; I would not have inquired of Dr. Little about it; I would have reported the fact to the home office and gotten them to inquire, or advised them to inquire. Question 24 is, "Have you had during the last seven years any disease or severe sickness? If so, state the particulars of each case and the name of the attending physician." He answered "No." Question 23 is, "Are you subject to dyspepsia, dysentery or diarrhœa?" It is there answered, "No." Yes, sir; I did, in fact, ask the question and get that answer; I would not have written it down if I had not. As to the relation that chronic gastritis would bear to the term "Dyspepsia" there, dyspepsia is a term that is used among laymen; it may have some gastritis trouble accompanied with pain; the term means painful digestion; it is very unusual with men who have chronic gastritis without some pain. Yes, sir; a layman being treated for chronic gastritis would be apt to call it dyspepsia. I think the doctor would have told him what he had, if he told the doctor he had dyspepsia, but in speaking to an acquaintance or other outside people he would probably allude to it as dyspepsia, because that was the symptom bothering him most.

Chronic gastritis is one symptom of dyspepsia, the pain in the
164 stomach during digestion; that is what the word means, painful digestion; painful digestion in the stomach is dyspepsia. Yes, sir; he answered "No" to that question.

Cross-examination.

By Mr. WIMBERLY.

Gastritis is inflammation of the stomach wall. Yes, sir; it may be caused from a variety of causes. Yes, sir; it may be simple and harmless, and may be the result of some very serious and dangerous condition. As to whether, when I say I could not pass a man who had chronic gastritis for six months, I base it upon the idea, without further inquiry, it may be one of the troubles of a serious kind, if it continued six months, it would be most sure to be. As to whether a man might have some comparatively slight stomach trouble that did not interfere with his work at all, about which he would talk to his physician several times in January and then skip consulting the physician until some time in March because he was not suffering during that time, and then at intervals along he might be treated, and yet there might be nothing but a curable form of gastritis and the man might not have any incurable disorder; some forms of chronic gastritis are curable. Yes, sir; the physician attending it should know better whether it was curable than a physician who had not followed that particular case. No; gastritis is not the same thing as dyspepsia; one is the symptom and the other the disease. As

to whether dyspepsia is wide enough to embrace quite a number of troubles, some of which would result from gas of the stomach, dyspepsia means painful digestion in the stomach. I can't think of any type of gastritis a man could have without some pain. As to whether, if a man was to have that vigorous kind of digestion that the doctor in charge said he had too much digestion, his digestion was too good, and it required that they should run water through his stomach and wash him out to tone down his digestion, there would be any dyspepsia about that, I have never seen a case without pain. I don't know of any form of gastritis that requires a person to have his stomach washed out every day or two and yet is not serious enough to keep him from doing vigorous muscular work twelve or fifteen hours every day, or from missing an hour from work, or from missing a meal during the time, or which does not affect his health at all, or prevent him from eating or working, and that the only effect of the gastritis is that the doctor should wash his stomach out and use electricity. As to whether gastritis — serious enough to require all that washing out would affect a man's vigor and
165 strength and his ability to work, I don't know what you mean by requiring to be washed out; I don't know what symptoms he had at all. The symptoms that require a man to be washed out for gastritis are generally stagnation of food, and sometimes accumulation of gas. No, sir; if he did not stagnate, but digested too good, I would not wash him out. As to whether, if a man digests his food too thoroughly, the accepted course of treatment by the medical fraternity is to run water through a man of that sort, I don't know of it if it is. I don't think he said Dr. Little, or one of the doctors, told him he had heart disease; trouble is the word, is my recollection. Yes, sir; after he told me that, I made as thorough an examination as I could. Yes, sir; the fact that of those two doctors, both of whom I know, one told him he had heart trouble, would of itself have made me more careful in examining. Yes, sir; I was as careful as I knew how to be. Yes, sir; I used not only my natural organs of hearing, but aided my ear by the use of an instrument called a stethoscope. A stethoscope is a short-distance telephone; it is an instrument with two tubes which go into each ear, and they come together in a rubber mouthpiece, so you can put the mouthpiece against the chest and it conveys the sound directly to the ear without letting in any outside sound at all. Yes; I think that greatly increases the power of the ear in following closely those sounds. No, sir; I did not find any mitral murmur with the use of the stethoscope. As to whether, if there had been a mitral murmur and a heart that was hypertrophied and the valves had been so as to bring the apex of the heart around on the wrong side of the nipple, I think I would have discovered that by the use of the stethoscope and the care I took. I can answer part of your question. The hypertrophy does not cause the murmur; if the murmur had been there, I should have recognized it. Yes, sir, if there had been a hypertrophy there, I should have recognized it. Yes, sir; if there had been a displacement on the wrong side of the nipple, I should have recognized that. No, sir; if the apex of his heart was to the right of the nipple, that would not indicate heart

disease, unless it was very much to the right. As to whether, if there had been a mitral murmur existing, as the result, not of anemia, but of organic disease of the heart, that had been discovered by a physician as much as three weeks before that, from the 15th of June to the 8th of July, I ought to have discovered that by the use of the stethoscope on July 8th, I answered just now, that I should have. No, sir; I discovered no anemia in Mr. Salgue's case; if there was, it was not profound. Yes, sir; he had every appearance of an exceptionally vigorous man. No, sir; there wasn't anything in the appearance or vigor of the man to indicate a weakening of the
166 heart muscle; a man may have weakened heart muscle without it showing in his general appearance. Yes, sir; it should show that when you examined the breathing, and the pulse, and the sound of the heart. As to whether the box that was over there by the window with watermelons in it was a heavy box, my recollection is it was; my recollection is it had watermelons in it, and I offered to help move the box, and he said no, he could move it. Yes, sir; he did move it like a very strong and vigorous man.

By the COURT:

No, sir, I do not remember how many watermelons were in it. The box was not as large as the shoe packing boxes, about the average-size box we see around country homes with wood in them. I don't remember whether he picked it up or not, except he moved it very easily; I remember commenting on it, and offered to help him, and he said no, he could move it across. The natural result would be to put an extra strain on the heart. The effect of that sudden exertion upon the heart would have been to increase the rapidity of the heart action and the force of the heart action, and put an extra strain upon the heart. Yes, sir; that would have tended to increase the distinctness of this mitral murmur if there was such a murmur. I applied the stethoscope immediately after that. Yes, sir; that is a binaural stethoscope. I don't think that increases the power of hearing so much as it shuts out all other sounds and directs all the sounds from that one point just to the ear. The stethoscope I used is not a magnifying stethoscope. Yes, sir; it is a concentrating stethoscope, in that it shuts out all other sounds. No, sir; I did not discover any murmur in applying that stethoscope. As to what other test of the heart I made at that time, I felt the pulse, and my recollection is I thumped with my fingers to see if the heart was enlarged; I examined the pulse of the applicant, and also pressed the chest with my fingers to see if there were any signs of enlargement of the heart. No, sir; I did not discover any.

By Mr. BLACK:

Yes, sir; I think it would be unusual, in chronic acid gastritis, as it is termed, for the physician to wash the patient's stomach out. As to whether there are a great many doctors who use that kind of treatment for that kind of stomach trouble, I don't know of them. Yes, sir; I know of Dr. Johnson, in Atlanta. No; I don't know that he uses that kind of treatment. Yes, sir; chronic acid gastritis is

caused by an excessive amount of gas in the stomach. Yes,
167 sir; any treatment any physician would use would be aimed to get rid of that acid and to prevent its coming. Yes, sir; one doctor might use one form, and another doctor might use another; there are a number of methods of treatment.

By the Court:

As to what the effect would probably be on a patient, of chronic acid gastritis lasting for six or eight months, requiring constant treatment, if the treatment corrects the trouble, I do not see that there would be much effect from it; if the treatment corrects the condition as it arises each time, I do not see that the patient would necessarily waste from the disease, or that it would have any detrimental effect on him. As to whether, if this treatment superinduces the necessity of his withdrawing the food from him, or flushing his stomach by mechanical means used by scientists, that would withdraw from him the strength that would result from proper nutrition, that much of it, if the food is withdrawn, of course he does not get that food. As to the effect on his system, if it was necessary to withdraw a portion of the food from the stomach, undigested food, or fermented food, I think it would depend entirely on the portion of food withdrawn, and whether the man got enough food that was not withdrawn, as to whether he would waste. Yes, sir; I have seen this operation of pumping out the stomach for chronic acid gastritis, flushing it out that way. We generally siphon it out by introducing a tube into the stomach and then filling the stomach with water and washing the outside end of the tube, and the contents siphon out. As to whether it is an operation which induces animated conversation on the part of the patient while it is going on, he generally grunts. No, sir; he does not betray any great loquacity, as a rule.

By Judge Miller:

No, they can't talk; they generally make signs; it would be very hard to talk with the tube in the mouth; they can grunt and generally make signs with the hands. As to whether it is practicable, in treating chronic gastritis, to allow the digestion to go on until the man has digested enough food, and then wash out the stomach, and it would bring out what remained, not digested, it will bring out everything in the stomach, unless it is so big it will not come through the tube. No, sir; I would not have recommended Salgue if, at the time of making the examination for the Aetna, I had known
or been informed by him that he had a short time previously
168 say within a month gone to Dr. Little for examination for insurance in the Penn Mutual, and had been by Dr. Little turned down with the statement that he had heart trouble and advised to go to his own doctor, and had immediately gone to Dr. McAfee with the statement from Little, that he had heart trouble, and McAfee had then examined him and told Salgue himself that he had heart disease, and afterwards treated him for it.

By Mr. WIMBERLY:

No, sir; he did not tell me that Dr. Little or Dr. Winchester had told him he had heart trouble; he said some trouble with his heart. No, sir; I did not ask him the circumstances under which Dr. Little or Dr. Winchester had told him that. Yes, sir; I did consider that material; he said he immediately consulted the other physician, and the other physician told him he did not. No; I did not think it was material why it was Dr. Little gave him that opinion; I asked him if he had any symptoms at all, and he said he had none. As to whether I thought the reason why Little gave him the opinion was material, I never thought much about that. Oh, yes, sir; the patient himself has feeling of heart trouble; the patient has many symptoms of heart trouble. As to whether, in this mitral murmur, the patient would know of it, he would not have known the valve was leaking, he would have symptoms. Yes, sir; if it was leaking enough for him to have felt it, I, as a physician should have found it. As to whether these organic heart troubles are painless in the earlier stages, some of them are, and some are not. Yes, sir; it is a fact that, taking heart trouble generally, the physician frequently can discover heart trouble when the patient does not know anything about its existence. As to whether what the physician examines him for is to determine for himself whether he has it, or not, you have to rely to some extent on what the patient himself says. Yes, sir; when he directs me to another physician, I am in as good a position to make an examination as that physician. I rely on my own examination, and what the patient tells. Yes, sir, I asked him other questions besides what are laid down on the sheet. I asked him if he had any symptoms of heart disease, if he had any pain, any shortness of breath, if he could go up and down stairs, and I asked him a number of questions.

By Mr. WIMBERLY:

As to whether all those questions serve to show whether he had heart trouble or not, they serve to show that he had no
169 subjective symptoms of it. As to whether the absence of those things would tend to show me he did not at the time have any serious heart trouble, no trouble with the failure of the heart to work can be serious without his knowing it. Yes, sir; I considered the absence of those things. Yes, sir; the symptoms asked about were the very kind that would have occurred if he had lifted a heavy box some distance; if he had had that sort of heart trouble, that would have affected the action of his heart; any exertion would accentuate his symptoms.

By the COURT:

Yes, sir; chronic acid gastritis is a common malady. As to how it compares with the commonest of all affections, I don't think it is as common as tuberculosis; I could not state the percentage; I have no figures on that at all; it is quite common, though. Yes, sir; the Encyclopedia Americana is looked upon as authority in some things. I think an article in an encyclopedia would be judged by the man

who wrote it, and not by the publication itself. I think it is uncommon in children; it is more common in adults. I think it is more common in the higher classes than in the lower classes, and more common in adults than in small children. I think it is quite uncommon in infants. I think, as a rule, popular articles on technical subjects are very poor in encyclopedias.

F. W. BIDDLE, sworn for the defendants, testified as follows:

Direct examination.

By Judge MILLER

I am supervisor for the Aetna Insurance Company, at the Home office. I have charge of death claims, annuities, instalments, and also various other duties about which I am consulted by the Vice-President and other officers. My home is in Hartford, Connecticut. I should say there are about seven old line life insurance companies there, dating back to 1818, at least, some one or two prior to that. I have been in the insurance business twenty-nine years last August, since I started out. I have examined death claims and annuities, looked after instalments. I have also had a hand in revising applications and policies, and various matters of that kind. Yes sir; I am familiar with the rules and customs and practice of the great insurance companies, my own included, from my personal experience. As to what would have been the result among insurance companies generally, large and small, if the answer to the question, "Has any physician expressed an unfavorable opinion upon your life with reference to life insurance; if so, state the particulars?" had been that Dr. William J. Little, in making an examination as the Medical Examiner of the Penn Mutual Company of this very applicant, John A. Salgue, had, in fact, expressed to him the opinion that he had heart trouble and advised him to go to his own doctor, Dr. J. C. McAfee, who in turn examined him, and examined him upon receiving the message from Dr. Little, and also declared to Salgue that his heart was affected or that he had heart disease, whether it would have enhanced the premium to be charged or would have led to a rejection of the risk, the application would have been rejected under those circumstances. If, instead of the question No. 16, "Has any proposal or application to insure your life been made to any company, association or agent, on which a policy of insurance is now pending? Or has any such proposal or application ever been made for which insurance has not been granted, or on which a policy or certificate was not issued for the full amount, and of the same kind as applied for? If so, state particulars, and the names of all such companies, associations or agents, being answered "None," it had been shown that there was then pending applications by Mr Salgue in the Provident Savings Insurance Company, the Sun Life Insurance Company and the Prudential Life Insurance Company of America, the companies generally would investigate the circumstances of the case, to see if he was endeavoring to obtain what the companies consider over-insurance, and it would depend on the cir-

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cumstances what action the companies would later take. No, sir; under the customs of the companies, they would not have insured without investigating the pending applications. I might qualify my answer by saying that if it appeared that there was a large amount applied for, the companies would then ascertain the circumstances of the case, look into the financial condition. Yes, sir; it is the custom of insurance companies to interchange information as to applicants; we very frequently ask such questions of one another. Yes, sir; the other companies answer. Yes, sir; that is usual among all insurance companies, frequently happening. If, instead of answering "No" to Question No. 21 asked of Mr. Salgue by Dr. Harrold, "Have you ever had any of the following diseases? Answer yes or no, opposite each; if yes, state the date, duration and severity of illness," he had said that he had been refused insurance by Dr. William J. Little, who told him that he had some heart trouble and advised him to go to his own physician, and he had gone to his own physician, Dr. McAfee, immediately thereafter, and had been told by him that he had heart disease, under the custom of the various companies and the rules and practice generally as I understand them,
171 they would have declined to accept the application for insurance; we call it decline; reject would be the same thing. The companies would not have issued the policy on such an application; the general custom of companies. I give the answer as to all companies, without regard to the Aetna. Yes, sir; the application would have been declined.

Cross-examination.

By Mr. Wimberly.

I am Supervisor of the Aetna Life Insurance Company at the Home Office. My duties keep me in the home office the larger share of the time; occasionally I go out on cases. My particular duties are to have full charge of all death claims, annuities, instalments, and I am also consulted in regard to revising policies, applications, and various other matters that come up. Yes, sir; I have charge of death claims. No, sir; I do not pass on the application originally. No, sir; I have nothing to do with that. No, sir; I am not a physician. No, sir; I have never discharged the duties of Medical Examiner. Yes, sir; the custom of insurance companies in these various matters is governed largely but not wholly by the opinion of their medical director, the Examiner at the home office. He is not wholly the man that reports as to whether he is accepted or rejected. He is not wholly the man that is consulted on matters of health. Yes, sir; we have other physicians at the home office of our Company. Yes, sir; we have a Medical Board. Yes, sir; that board is made up of medical experts. I can't say whether they have made that their life study. Yes, sir; they have made it their special work during the time they have been on the Board. Yes, sir; they are the officers charged with the duties of passing upon the health risk and the effects of various diseases. No, sir; I am not on that Board and never have been. No, sir; I have nothing whatever to do with

the acceptance of the policy. No, sir; that is not within my line. As to whether when I speak of the custom of companies, I get the custom chiefly from passing on death claims when I am deciding whether we are going to fight them or not; I am supposed to have a general knowledge of all those things in order to do my work properly. Yes, sir; it is a part of my duties to decide on whether to contest a case or not. No, sir; I am not the man, when a case is contested, that has charge of it as Special Agent to assist the lawyer. Yes, sir; I do work sometimes like I am doing here. Yes, sir; I am the representative of the Company in this defense. Yes, sir; that is the purpose of my presence here. Yes, sir; we have a provision in our policies that they are incontestable after the first year. Yes, sir; of the amount we pay in a year—three million dollars approximately—the largest part of that is on policies that have gone beyond one year. As to whether nine tenths of it is paid on policies where the parties have been insured more than a year, I can't state the proportion. Yes, sir; a very much larger portion. No, sir; policies that are in process of adjustment are not really those that we are considering whether to contest or not. Yes, sir; my experience comes, in a measure, not wholly, in passing on death claims and assisting the lawyers to fight the death claims. No, sir; I have nothing whatever to do with the risk as long as a man is living and paying his insurance all right. No, sir; I do not learn my knowledge of the customs of insurance companies in the court house in assisting our lawyers to fight these claims and determining to fight them so I can save my Company money by turning them down. I learned my knowledge of the customs of insurance companies from my duties in the office and my duties in passing on death claims. As to whether my duties away from the office are defending death claims, I go on cases sometimes to look after the interest of the Company as far as I can. Yes, sir, it is in my line of duty to do that. Yes, sir; there is litigation of consequence, a good big policy like this, five or six thousand dollars, where I am engaged in some other court, that I do not attend. No, sir; I do not always attend unless there is something else to prevent. No, sir; it is not my rule to attend. No, sir. I do not merely attend when we have got a hard case on our hands. Whether I attend or not merely depends on whether I have been on the case at all before, had any connection with the case or not; the majority of cases I do not attend court. Yes, sir; I have been on this case before. Yes, sir; I am on all cases that are contested where the death claims pass before me. I did not come down here before this present trial purposely to investigate this case; while on another case, I investigated this at that time. If my memory serves me correctly, the other case I was investigating was in Georgia, a case we paid. Yes, sir; it was in Macon. I think it was in 1905 that I came to Georgia. Mr. Salgue was dead. I can't state how long it was after his death; I think Mr Moore will remember. No, sir, that was not the only time I came to Georgia except this present time to investigate this present claim. No, sir; it is not the only time I came in connection with this claim. I don't remember how many times I have been to Georgia in connection with this claim; I

think when I was in Tennessee on another case, I came through here; I merely stopped off for a little chat with Judge Miller. No, sir; the matter of the desirability of a risk is not wholly a
173 matter for the examining board to pass upon. No, sir; I do not pass on it; I have nothing to do with it, never have had.

Redirect examination.

By Judge MILLER:

I wish to reconstruct my answer to Mr. Wimberly, that I came down the latter part of the year 1905; I had the year 1905 in mind; I did not come down on this case before Mr. Sal*g*ue's death, and the year must have been the year of his death, because it was a few months thereafter that I came down here and stopped on that case. Yes, sir; I think that was the time I came down also on case of Lowe.

Recross-examination.

By Mr. WIMBERLY:

Yes, sir; it is true that the Aetna and a number of other companies doing the bulk of the business in this country, some thirty in number, have a sort of what might be called an exchange of information bureau, or association to furnish each other with information. I don't know that it is about all matters that may affect a risk, and all such information; they have got a bureau which is supposed to report. No, sir; they do not answer any question and give any information asked, in that bureau. Yes; the other companies answer any question asked, as a matter of courtesy; they are under no obligation to do so.

By Mr. BLACK:

That bureau is only a bureau concerning rejections; that is all Defendants closed.

174 Thereupon the following evidence was introduced by and upon behalf of the plaintiff in this cause in rebuttal:

Dr. R. B. BARRON, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

My profession is that of a physician. I have been a practising physician twenty-six years. I live and practice medicine in Macon. Yes, sir; I examine applicants for insurance companies. Yes, sir; I examined Mr. John A. Salgue in his life time, for insurance, for the Sun Life of Montreal, and the Provident Savings of New York. Yes, sir; I remember the time I made the examination; I examined Mr. Salgue for the Sun Life on June 29th, 1905, and for the Provident Savings on July 1st, 1905. Yes, sir; I examined his heart, to see whether there was any heart affection or trouble. I stripped

Mr. Salgue to his flesh, and made a thorough examination, as I always do for life insurance companies, and found nothing detrimental to his receiving insurance, and recommended him. Yes, sir; I made that examination on both occasions. I did not find any disease of the heart on those two occasions. Yes, sir; I think, if there had been any organic disease of the heart, I think I would have discovered it in the investigation I made. Yes, sir; I think, if there had been any abnormal enlargement of the heart, a displacement of the apex of the heart, I would have discovered it on those two examinations. Yes, sir; I am sure I would have discovered it, if there had been any mitral murmur of the heart. No, sir; I did not discover either of those symptoms. The apex of the heart is usually slightly to the left of the nipple; it is not always. In Mr. Salgue's case, it was in what we consider the normal position. No, sir, everybody's heart is not located just exactly alike; a man of Mr. Salgue's size and physical development, as he appeared to me, might lead me to look for the apex of his heart in a different position from what I would yours. No, sir; everybody's heart is not the same size; it varies very much according to the physical effort and physical labor of the man. I did not find Mr. Salgue's heart abnormal, considering his development and ability to work. By my statement that I would not look for Mr. Salgue's heart in the same place that I would look for Mr. Wimberly's, I meant that I would expect to find
173 a larger heart in Mr. Salgue than in Mr. Wimberly. Possibly I do not know Mr. Wimberly. I did not refer to the hospitable feature of it, but to the anatomical condition of it. As to whether a man will have a larger heart, just as a larger man will have larger muscles on his legs and arms, what I meant to convey by my answer was that a man that engages in physical labor would naturally have a larger heart and a more thoroughly developed heart, as to the anatomical condition, than a man that had sedentary habits. Yes, sir; the heart is consequently larger. Yes, sir; it is my impression that a man who uses his muscles largely might have a larger heart. As to Mr. Salgue's general health and physical appearance, when Mr. Salgue came into my office on the 29th of June I remember especially distinctly that day in 1905, I thought he was the finest specimen of physical manhood, or one as fine as I ever saw. he had clay on his shoes, and he had his sleeves rolled above the elbow, and he was well developed physically and every other way, so far as I could see, and I thought him an excellent specimen of manhood. No, sir; there wasn't anything to evidence the existence of any disease. Gastritis, technically, is recognized as the inflamed condition of the mucus membrane of the stomach. Yes; I think it is a curable disease. As to what I would say as to a case of gastritis that had as its type too much digestion, and how I would treat gastritis of that kind, I do not usually find that kind. I do not usually find a stomach that digests too much, that has too much digestive power; it is the want of digestive power I find. There may be such a disease as gastritis that consists of too much digestion, but I have not found it. If a patient came to me that had no pain, no emaciation, had his strength and ability to work and his only complaint was of his di-

gestive powers being too strong, I don't think I would prescribe for him; I think I would advise him to go home and get his mind clear. No, sir; I would not wash his stomach out. As to what trouble we wash a man's stomach out for, there are some physicians and capable men that follow the line of washing out the stomach; it is not the usual practice of the profession. I heard the question propounded by the opposition. I have very kindly and professional feeling for Dr. McAfee, and the other man Dr. Johnson, I think, mentioned by the other gent man, in Atlanta, that washed out stomachs. I have seen it once in my life, and I do not care to see it any more. No, sir; it is not the commonly accepted medical treatment. I saw no evidence, physical, subjective or otherwise, of Mr. Salgue being a sufferer from gastritis, at the time I examined him. As to what would have been the proper symptom to have existed at the time, if he had gastritis, we usually have emaciation following gastritis. No, sir; there was not any emaciation there. No, sir; there was not any temperature, according to the best of my recollection; whatever the report shows is my answer. Yes, sir; I mean temperature above the normal. I don't see the question of temperature on these two reports. Yes, sir; if there had been any increased temperature, the chances are I would have reported that fact, but if the question was not asked, I may not have made it. Some policies ask the question of temperature, and others do not. I do not see that in this policy. Yes, sir; I presume that is correct, as asked there, that I examined him with a stethoscope. As to how thorough the examination was that I made, to see if he had a sound and normal heart, it was the same kind that I would make of every man; I stripped him to his waist, removed his clothing, and used my stethoscope, and ascertain if there are any functional or organic trouble with the heart. No, sir; I found nothing in that examination that would point in any way even slightly to the existence of any heart trouble. As I said before, I examine the man, and recommended him for insurance; yes, sir; in two companies. Yes, sir; my impression is he was accepted by both companies. As to whether organic heart disease is a thing the patient would be conscious of in the earlier stages, or whether it is a matter that is determined by a physician, it is very rarely the beginning of heart trouble can be recognized by the patient. Yes, sir; it is a matter that is determined by the physician's examination.

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Cross-examination.

By Mr. Black:

As to whether I asked Question 15: "Has any company ever declined to insure your life, or offered you a policy on a different plan, or at a higher premium than that for which you applied," and what his answer was; the answer is "No"; I presume that, without any question, I asked that question, and that is the answer. I have no question that I asked Question 16: "Has any physician ever given you an unfavorable opinion upon your life, with reference to life insurance? If so, state particulars," and his answer is "No". I have no question that I asked Question 17: "Has any application

been made by you to any company, and afterwards withdrawn? Give details," and his answer is "No." Yes, sir; I asked him Question 5: "Have you now, or have you ever had any of the
177 following diseases: answer yes or no to each? Have you ever had disease of the heart?" and "No" is the answer that he gave me. As to whether I asked him Question 11: "When and by what physician were you last attended, and for what complaint," and he answered to that question, "Dr. Stapler;" I presume that is correct; I think it is. As to whether I asked him this question 15: "Has any life insurance organization postponed or rejected your application for insurance, or restoration of an elapsed policy?" and he replied "No," as written there, I think that is correct. When I spoke of the opposition having asked Dr. McAfee a question, I meant you, Mr. Black, by the opposition. By opposition, I meant the opposing counsel. As to who I mean you were opposing, I presume you represent the defense. Yes; most assuredly, I mean by that opposing the plaintiff. I did not mean any animosity, I will assure you; I was not made that way. Yes, sir; I know Dr. Osler, and have heard him lecture on medical subjects. Yes, sir; I consider him an authority; I think he is one of the most excellent I ever knew of. Yes, sir; if the heart did not furnish sufficient blood for the system, that might result in gastritis. Yes, sir; there may be a relation between gastritis and incomplete heart action; there might be. If you will excuse me, there may be a relation between any organ of the body and the heart, when the heart fails to properly perform its function. As to whether insufficient circulation through the portal is recognized in authorities as being one of the reasons for the condition of gastritis in the stomach, I don't think it would be as much through the portal as it would through the arterial. As to whether I agree with Dr. Osler: "Conditions of the portal circulation, causing chronic engorgement of the mucus membrane, as in chronic heart disease, and certain chronic lung affection," I did not say the portal might not produce it; I said I thought the arterial would be more liable to produce it than the portal circulation. As to how many forms of gastritis there are, that depends on the doctor you meet up with. In medicine, we usually recognize acute, chronic and subacute symptoms. I never heard of such a form of gastritis as acid gastritis, until I came in this court. As to whether washing out the stomach is recognized in medical authorities as one of the best methods of treating gastritis, I think there are certain people that recognize it; as a member of the profession at large, I don't think so. As to whether I would if Dr. Osler said it was one of the best ways, anything Dr. Osler would say I would agree to, under ordinary conditions; at the same time, I might not practice
178 it. Lavage is washing out of the stomach. As to whether I agree with Dr. Osler, if his opinion is: "Of measures which stimulate the glandular activity in chronic dyspepsia, lavage is by far the most important, particularly in the forms characterized by the secretion of a large quantity of mucus. Luke warm water should be used, or, if there is much mucus, a 1 per cent salt solution, or a 3 to 5 per cent solution of bicarbonate of soda. If there is much

fermentation, the 3 per cent solution of borac acid may be used, or a dilute solution of carbolic acid. It is best employed in the morning on an empty stomach, or in the evening, some hours after the last meal. It is perhaps preferable in the morning, except in those cases in which there is much nocturnal distress and flatulency. Once a day is, as a rule, sufficient, or, in the case of delicate persons, every second day. The irrogation may be continued until the water which comes away is quite clear. It is not necessary to remove all the fluid after the irrigation." as I said before, I think any opinion offered by Dr. Osler cannot be improved upon; furthermore, I want to state here and now that it is not the general practice in my town, or in the State of Georgia. Yes, sir; I remember who Dr. Crawford Long was. He is represented to have discovered anaesthesia. It was about five years after it was discovered before it was used generally. This has been going on in Dr. Osler's book; I have one volume issued in 1891; it was published then. I presume it is still published; the last edition I think has it, but altogether as strong as the former. I think 1891 is stronger. Yes, sir, I examined the heart of Mr. Salgne. I discovered no mitral murmur at all, unless my report says so; and if I did, I would not have recommended him for insurance. As to whether I could be mistaken as to whether there was a mitral murmur, or not we all may be mistaken. A mitral murmur is a failure of the blood to properly pass through the valves of the heart, the valves between the passage from the auricle into the ventrical. The mitral valves are the valves affected; that designates itself. The effect of the incompetency of the mitral, the effect on the heart, is to produce the range circulation. Yes, sir; it has an effect on the ventricles of the heart. I don't know that I can answer the question, which ventricle of the heart becomes affected first, the right or the left, where there is a mitral murmur. If Mr. Salgne's heart was a little out of place, and I put my ear to his body over the nipple, I think the chances are I would have heard the mitral murmur. Yes, sir; I could be mistaken. Yes; I think it is also true that a mitral murmur may be more apparent at
179 one time than another. No, the noise a mitral murmur makes does not necessarily depend on the position of the patient; a mitral murmur, or any murmur of the heart may be more distinct at one time than at another. As to whether it may be more distinct in an recumbent position than standing, I think it is the other way. Yes, sir; the distinctness of the mitral murmur depends on the position of the body, and other things. Yes, sir; where you have a heart murmur, you expect sooner or later a hypertrophied condition of the heart, enlargement, in other words. Yes, sir; that is the natural consequence. Ordinarily, there are no subjective symptoms of a mitral murmur, until the murmur has reached that place or point where the heart fails to properly circulate the blood and produces an enlargement, not only of the structures of the heart, but also extend the muscular structure of the heart and increases the cavity of the heart; when that arises, then you have something upon which you can base an opinion. The natural progress of a heart affection which starts with a mitral murmur is

ultimately to the destruction of the person that has it. When the heart is destroyed, the person is, naturally, sometimes, not always. Yes, sir; it is my opinion that the natural progressiveness of the disease that starts with a mitral murmur is the destruction of the person. Yes, sir; the listening to the heart is called *ostolation*. Yes, sir, that may be distinct at one time, and indefinite at another; I have heard heart murmurs at one time, and at another, in a man I was satisfied had murmurs of the heart, I could not hear them.

Dr. G. P. GOSTIN, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

My profession is that of physician. I have practiced medicine thirty-one years. I reside and practice medicine here in Macon. Yes, sir; I knew Mr. John A. Salgue in his life time. When he first consulted me professionally was on the 18th of April, 1906. I was sent for; he was out at Mr. Morgan's drug store; the first time I ever met him was at that time. He wanted me to come out and examine him and prescribe for him, which I did. That was the first time I ever saw the gentleman. Yes, sir; I examined him at that time. I took him in the back room of the drug store, and stripped him to the waist, and made a pretty thorough ex-
180 amination. I found, as the result of that examination, that he had an engorgement of the liver, suffering from a malarial attack, seemed to be a malarial condition of the liver. I examined his heart and everything as thoroughly as I could, and prescribed for him, and asked him to come to my office when the medicine gave out, which lasted six days. Yes, sir; he did that. After I prescribed for him, and he came to my office, I think it was on the 24th of April. I took him in the office, and stripped his clothes to his waist, and I made another thorough examination, and to all appearances, he was all right; he told me he was all right; I made a thorough examination, and found he was, so far as I could find. No, sir; he did not, at the time of either of these examinations, have any heart disease, that I could find. Yes, sir; I examined him carefully. I examined him thoroughly, and did not find any murmur of the heart. No, sir; I did not find any mitral murmur at that time. No, sir; I did not find any enlargement. No, sir; I did not find any displacement of the apex of the heart; it was all normal, so far as I could find. As to whether, in my judgment, from my examination at that time, he had any heart disease in April, 1906, if he had any, I could not find any; I made a thorough examination with my ear; and then I examined him with the phenendescope; I used the phenendescope. Yes, sir; that magnifies sound. With that instrument I could detect nothing of a mitral murmur, or anything indicating heart disease. The next time I saw him, I met him on the street, and he asked me about his bill, and I told him I did not know exactly what it was. He said: "If you have got time, I will go with you up to your office; I can pay it now." He went with me up to my office, to find out what his bill was, and I did not examine

him at that time; that was about the 30th of April; and I asked him how he was getting on, and I believe his answer was, he was as good a man as there was in Macon. His appearance was just as fine as could be. I did not see any difficulty in breathing, or shortness of breath, or anything pointing to heart trouble; he went up the stairs with me, and I did not see any. I did not discover anything abnormal with his heart, at all. During these different times the liver disease was all the disease I found; when I examined him the first time, I found his liver was tender on pressure; he complained of heaviness in that side, which I found to be a malarial trouble.

By the Court:

181 I don't know where he worked; he told me he was working at the Bibb Brick Company. No, sir; I do not know where that is; I never was there in my life; it is down in the swamp, I know. Yes, sir; I know it is in the swamp. Yes, sir; that swamp is a very salubrious spot; it is a place I don't want to stay; I never was in there myself.

By Mr. Wimberly:

As to whether the swamp there is liable to cause this malarial trouble I found, my experience is that all swampy stagnant water is of that nature. I attributed his trouble to the place where he worked and lived, was all. As to when I next saw him or prescribed for him after April 30th, I was sitting in my office one day during my office hours, and he came up the steps and came into my office and says to me: "Doctor, I have hurt myself, and I want you to give me something to ease my pain; I am suffering a great deal of pain." That was on the 8th of May. He said he was either putting some machinery on a car or getting it off a car, and in some manner I don't recollect which he said, he listed it, and hurt himself, and he was in a good deal of pain. I examined him, and gave him something for it; he was complaining right considerably; he said it felt like a hot place in his chest, that it seemed like it was on fire, it was burning so. I examined him pretty thoroughly, stripped his clothes to his waist again, put him on the table, and examined him pretty thoroughly, took my phenendescope, and tried him again. I could not find anything that day; that would seem to be abnormal, so I told him to come back the next day. He said: "Well, I want you to give me something to ease me." I gave him some little medicines to ease the pain, and he came back the next day to see me. I made the same examination again, went through it in the same way, and I could discover, as I thought at that time, just the least murmur, a little pulse-like murmur. Still, I told him I would not give him anything for it. I wanted him to come back the next day, which he did. On the third day when he came back, I examined him and made up my diagnosis thoroughly. I was satisfied about it, and I gave him his treatment, and advised him to go home and let me place an ice bag on his chest. My diagnosis at that time was a false aneurism of the fourth or fifth valve of the aorta. I thought maybe, by putting that on there, I could cause a contraction, and cause a

decrease of the aneurism. He would not do it. When I found he would not, I told him to come back the next day; it was getting interesting; I have seen a good many aneurisms, but I never
182 saw one working that way, and I told him to come back the next day. It was still getting louder and bigger, and he was suffering with pain, and I still advised him not to go back to work, that was on the fourth day. On the fifth day he came back, and it was getting louder and louder. I increased the medicine, and still I insisted on him being quiet, to go home and go to bed. He said he could not do it. I said: "Mr. Moore will attend to your business." He said: "Mr. Moore don't know about my business like I do." I had him to come back the sixth day. I was watching him, and doing what I could. I told him on the sixth day: "It is merely a matter of time; you have got to do it; you will have to quit work." I was begging him to quit work. On the seventh day, he came back, and the same thing over again. On the eighth day, I told him he would either have to quit work, or he would die at his work, and he had better go home and go to bed. He said: "Doctor, I have been advised to go to Indian Springs." I said: "Anywhere to get out of your business, to get away from your business, and be quiet." I advised him to go to Indian Springs and go to bed. He went up there, and was gone about a week or ten days, or probably two weeks. I don't know the exact time. He wrote me he was feeling first rate lying in bed, and he thought he would be all right when he got up. I wrote him not to come home, I thought it was dangerous. Before I heard from him, he started home, and died suddenly on the train. From the symptoms I have given as to the course of the disease took, I think that lifting that machinery was the first cause of his death. As to how that caused his death, in lifting that machinery, the blood vessels are made up of three coats, three distinct coats; in lifting the machinery, he tore the internal and middle coats of this blood vessel, that was where his pain came from and the blood was forced through or stretched this external coat on the surrounding wall, forming the aneurism, and the aneurism got larger and larger every day as it went on, until it got so it pressed on the lungs and produced shortness of breath, and he could not breathe well without getting on his left side. Well, that went on, and that caking up caused a rupture of the blood vessel, and he was gone. I think the trouble that killed him would be called aneurism; I think Osler put it down as aneurism. I have got his last works, and have been reading them. As to what organs the aneurism affected, it was in the arch of the aorta. Yes, sir; I know that caused his death. The aorta is the large blood vessel that con-
veys the blood from the heart. Yes, sir; it is one of the blood
183 vessels that make up the arterial system. The part of the arterial system that is known as the aorta is the large blood vessel that passes from the heart to distribute the blood out through the system, from which other branches come; it is a large blood vessel that comes up and ascends and descends. Yes, sir; the place where it turns is what we call the arch. As to whether he had any heart disease or heart trouble before the lifting of the heavy weight

causing the aneurism, if he had any, I did not find it; I examined him pretty thoroughly; I have a little instrument, the phenendescope; I examined the blood vessels with it, and I could not find any. No, sir; I do not think heart disease caused his death or contributed to it at all. No, sir; I don't think any stomach trouble, gastritis, contributed in any way to his death; he did not give any sign of gastritis at the time.

Cross-examination.

By Mr. Black:

I think the first cause of his death was his lifting that machinery and rupturing the coat of that aorta. The technical name of it is aneurism of the arch of the aorta. No, it was not thoracic aneurism. It is hard to tell what the difference is between aneurism such as I think he had, and thoracic aneurism. When you have got a thoracic aneurism, it is a small one, and in the first place, I don't believe you could find it. No, sir; I don't think he had thoracic aneurism. Yes, sir; this is the death proof to the Aetna Life Insurance Company. This was made out June 5th, 1906. Yes, sir; I signed that. Yes, sir; that is my handwriting. Yes, sir; I think I swore to it. Yes, sir; I stated in that death proof, thoracic aneurism; I meant by that he had an aneurism of the aorta, you see, it is ascending and descending; there are two or three portions of it. This proof of death furnished to the Prudential, is the same, died of aneurism of the aorta; there are different sections of the aorta; it arches from the heart, arches up first and then goes down there, descending and ascending. I swore here that he died of aneurism; that is what I swore to; that is what he died with. Yes, sir; in answering Question 10 "State the remote cause of the death?" I stated here thoracic. Either one would have noted the one there. That vessel there arched from the heart up and descended and wound down so, whether it was from the top or the bottom. Yes, sir; when I went to see him on April 18th I discovered that he had an enlarged liver. No, sir; that is not the direct result of having a diseased heart. As to whether disease of the heart affects the liver, it may in some cases, and in some it don't; I don't think it does. I know numbers of them that have heart trouble, that haven't got any liver trouble. Yes, sir, I suppose sometimes an enlarged liver follows an affection of the heart, is the result of a heart affection. Yes, sir; this enlarged liver I found might have been the result of heart trouble, but I don't think so. If there was any heart trouble there, I did not discover it. Yes, sir; the enlarged liver might possibly be the result of heart trouble. As to whether I found anything abnormal before May 8th, I found he was suffering with malaria on the 18th of April. No, sir; I did not find anything the matter with the heart then. I made my diagnosis on the third day; I did not find anything the matter with his heart then. No, sir; I never did find anything the matter with his heart. No, sir; we did not have an affection of the circulatory system in heart disease; the circulatory system has nothing to do with the heart. I suppose the

aorta is an inch and a half or two inches from the heart. No, sir, it does not come out of the heart; it comes from the vessels surrounding the heart. Yes, sir; the aorta is fastened to the heart. As to whether I would consider it a part of the heart, right around the heart is apt to be, but not as far as the arch. No, sir; the heart is not necessarily affected if the aorta is affected. Yes, sir; the distinction I am making is my idea of the aneurism. As to whether it was about an inch and a half, I can't say for certain whether it was in the arch or in one of the ascending or descending vessels; it was there in the neighborhood. As to whether I could tell whether it was right on the heart, or an inch and a half away, it was not right on the heart, I know, an inch or more or further than that.

By Judge MILLER.

As to whether I have a fixed opinion that this man died of thoracic aneurism, it was in the neighborhood there; I suppose it was either in the branch or the arch; it was right in that neighborhood. You see, the descending starts from the arch, and the ascending starts from the arch. Thoracic aneurism means aneurism of the thoracic aorta. What is known as a true aneurism is an enlargement of all of the arterial coats of the aorta uniting to form a pouch. That is in one place of the blood vessel. They are apt to appear in 185 any part of the body; they are as apt to appear in one place as another; they occur in various places of the body. Yes, sir; we get them in the leg or the arm, or anywhere. As to the result that takes place when aneurism causes death, it is a rupture, but not every time; you can get an aneurism that will cause death from suffocation, pressure on the blood vessels. Yes, sir; they will sometimes form a clot and go to the brain, and produce softening of the brain and a good many things. Yes, sir; there is such a thing as aneurism of the heart itself; you can get an aneurism; it is called varicose aneurism, where there is a connection between the blood vessels and the valves. I believe that is the way Osler puts it. You can have aneurism of the heart between valves of the heart, or you can have it between the aorta and the pulmonary artery. What we call varicose aneurism is that between the valves and the blood vessels. Yes, sir; there is such a thing as aneurism of the vessels of the heart. By vessel I mean small blood vessels. You see Osler put it down there. I don't know when I read that, probably a week or two ago, no, not right recently. It would be a pretty hard question to tell the difference between an aneurism of the aorta and an aneurism of the heart proper, except of the heart proper. I don't believe you can get into it well; you have to go by signs, and the only one I you can get at that, would be by the regurgitation of the blood. Yes, sir; you listen to the heart and you mighty quick find they are there, too. As to whether I can tell the difference between aneurism of the heart and heart disease, I don't know that I have ever seen a case of aneurism of the heart; I would have to study that thing before I could tell you anything about it; I have never seen a varicose aneurism; I have seen what is true, and what is known as false aneurism; I have never seen a case of varicose aneurism. As

to whether a man can have a valvular aneurism next to the heart, they say you can have that; that is known as a varicose aneurism. As to what would be the difference in the murmur given off between a valvular disease of the heart and an aneurism of the heart, they both give some sort of regurgitation sound; I couldn't tell you the difference between the sound to save my life. I am positive this man did not have anything the matter with his heart; I know because he had a normal heart sound; a man with a normal heart sound don't have any heart trouble. No; I did not find any abnormal sound in my previous examination of this man's heart. As to whether an aneurism of the heart produces similar murmurs to heart disease, it would have a regurgitant murmur, but he
186 did not have any heart disease. A man with heart disease can have similar sounds from his heart as when he had an aneurism of the heart; yes, those sounds I stated they are so much alike, it would be hard to distinguish them; I don't think I could distinguish them. No, sir; I did not hear Dr. McHatton's testimony. Yes, sir; he stands all right in the medical profession. I do not consider Dr. McHatton any more the dean of the medical force in Macon than some others; I think they are just as much of a dean as he is. Yes, sir; he is recognized as high as anybody in Macon. No, sir; after listening to the reading of Dr. McHatton's testimony about the man having heart disease, or this regurgitant murmur of the heart indicating his condition, I would not change my opinion as to his not having heart disease when I examined him in March and April, 1906. I have made it a rule of my life never to take any man's word for anything, and I examined him myself. Dr. McHatton may be right, so far as I know. When I got hold of him I did not find anything at all. Yes, sir; the date of my first visit was in April, 1906. Yes, sir; I treated him up into May. As to whether the time that Dr. McHatton was treating him, March 1st, 20th and 30th, and April 15th and 15th, 1906, was during the period of my treatment, I was called to see him on the 18th of April, 1906. As to whether he came in three days from McHatton to me, I went to see him, and found him suffering with that enlarged condition of the liver, and I diagnosed it as of malarial origin. No, sir; I did not go to see him sooner than that. I made only that one visit, and I found him suffering with a painful liver and a very heavy dragging feeling in the side, and on pressure the liver was tender, and I then made a thorough examination, as thorough as I could, of his heart and all the circulation, and I found no enlargement of the heart, but I did find the liver swollen, and on the treatment it gave way readily, as nice as anything I ever saw. I gave him calomel; I think I gave him twenty-four grains in six doses, and put him on protiodide of mercury three times a day after I gave him a course of calomel. Yes, sir; I gave him a very vigorous calomel treatment, because his liver needed it. I gave him that calomel every three hours, I think, until he was thoroughly purged, and after that I put him on one-half grain of protiodide of mercury, and I gave him enough to last six days until he took it up, and then to come to my office. I gave him twenty-four grains of calomel,

187 divided into six doses. As to whether, if McHatton was treating him on the 13th and 15th of April, for heart disease, when I went to see him on the 18th, three days later: I examined the liver more than anything else, until I examined his circulation; his pulse was just as regular as could be, and I found no sign of any mitral trouble. Yes, sir; I examined his heart and examined his whole body. As to my being called in for a man who was apparently suffering from malaria, and my impression being confirmed by what he told me as to his symptoms, I examined him, and I just judged from my physical examination of the man and all; I questioned him; I never saw the man before in my life, and I was obliged to take his word for it. No; he did not say anything that directed my attention to his heart. No; I did not examine his kidneys. As to whether there was any special attention to the heart in that examination, a man naturally, if you are going to make any examination at all, will examine his heart and pulse and temperature; he had no fever, and his temperature was normal, 98½. No, sir; he did not tell me that only three days before that he had been under treatment of Dr. Mulhatton for his heart. No, sir; he did not tell me anything about any previous troubles or interviews of some time before, that Dr. Little had given an adverse opinion about the condition of his heart. No, sir; he did not tell me anything about McAfee's treatment. No, sir; he did not mention any previous sickness and treatment by doctors, naming them; his very words were these; he told me he was suffering with his liver, and his bowels were a little constipated; I had another patient that lived right there by him, and this patient had advised him to come to me and let me give him a course of treatment; I had relieved so quickly, he thought I could relieve him, and on examination I did not ask him any questions about it; I know he told me where he was working, and I knew from where he worked, where he said it was, it was obliged to be sickly in the swamp. No, sir; he did not mention Dr. Ross treating him for malaria. I don't know whether you can go to one of the windows here and see the brick plant right down there or not; I never looked for it in my life. I don't know where it is. As to its being right at the foot of Poplar Street, and your being able to get there in five or six minutes, if you will give me my car, I can get there quicker than that; I never was down there; I can't tell you where it is. As to its being just a little to the right of Jacques & Tinsley's warehouse, I don't know where it is; I never was there in my life; I couldn't tell you to save my life where it is.

188 By the COURT:

The arterial system is the arteries that convey the blood from the heart to the body. Yes, sir; this aorta is the great canal that supplies the arteries of the heart. Yes, sir; the thorax is the chest which holds the heart rigid. The aorta passes from the right side of the heart. As to whether it springs from the left ventricle of the heart, I have not glanced at that authority in some time. Yes, sir; I know there was an aneurism somewhere there in the aorta. Yes, sir; that is my testimony. Yes, sir; an aneurism is a disease of the walls of

the arteries, resulting in the formation of a pulsating sac or swelling. There are three or four forms of aneurism. Yes, sir; when the disease process leads to the rupture of the walls of the blood vessels with an extravisation of blood into the adjacent tissues, making a tumor-like formation, such an aneurismal swelling is known as a false aneurism. As to whether, in the true aneurism, the sac is formed by one or more of the coats of the arteries, a true aneurism is put down in most of the words as being a dilation of the walls of the artery and uniting to form a pouch, and it makes a sort of pouch like. Yes, sir; the true aneurism varies in size and shape. Yes, sir; it is true that sometimes they are fusiform, cylindrical, cirsoid, in which a branch of the artery is included in the swelling, circumscribed or sacculated. Yes, sir; there may be an arterio-venus aneurism; that is what they call a varicose aneurism. Yes, sir, the causes of aneurism are manifold; the most important feature is a chronic disease of the connective tissue of the blood vessels arterio-sclerosis that results in the weakening of the walls and gradual distention of the vessel with the formation of a sac. Yes, sir; the symptoms are often extremely obscure and depend in large part on the presence of a tumor that makes pressure symptoms on important organs; that is my scientific experience with them. As to the progress of the disease, the effect on the patient and how he dies, some of them may go on for years, and then die from a dropsical affection; some of them die suddenly. I don't think there is any rule or standard how he should die. As to what length of time some of them may live, some may live a long time; I have had several of those that have lived a long time. Yes, sir; some may die suddenly. The natural course of the malady resulting from a true aneurism, that aneurism may go on and enlarge and enlarge, and get against the chest walls and obscure the ribs or the bony portion. I saw a case a few years
189 ago, a Mr. Horton, that went on and obscured three ribs. That went on to where he could not work and he had to be sent to his home and be taken care of. It obscured several of his ribs. That was a true aneurism. Yes, sir; an aneurism sometimes comes from violent exercise on the part of a healthy man. As to whether it usually comes from a disease of the connective tissue, it can come from that. I don't recollect about the authority on that; I couldn't tell you whether it usually comes that way or not. My opinion as to the effect of the continued presence of that heart disease evidenced by a mitral murmur upon the general health of the sufferer, from my experience with it, I have had several cases, they, as a rule, get nervous and some of them lose flesh, and there are various ways it affects them, some get as nervous as can be, and it affects them in that way, and I have seen a few cases of those mitral murmurs that they never knew it at all. As to whether they would know it by its effect on their system, their health, they seem to be getting on pretty well. As to whether they show any special anaemic result, some do and some do not.

Redirect examination.

By Mr. WIMBERLY:

No, sir; this aneurism I have testified about was not an aneurism of the heart. Yes, sir; if a congested liver resulted from the heart, there would be signs of the heart affection, as well as the congested liver. No, sir; I did not find signs of heart affection there. If the engorged liver had been caused by chronic heart trouble, the heart would not have yielded to the treatment I put him under; it would sort of mitigate the heart trouble; I don't think the liver could be relieved entirely if it was caused by that. Yes, sir; of course, when the trouble gave way perfectly under the treatment I prescribed, that tended to confirm my diagnosis of the liver trouble.

190 JOHN T. MOORE, plaintiff, sworn in his own behalf, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; I am the plaintiff in these cases, as the administrator of John A. Salgue, deceased. No, sir; I have no interest in it, other than my official duty as administrator. Yes, sir; I knew Mr. John A. Salgue in his life time. He was employed as superintendent of the Bibb Brick Company. I was secretary and treasurer of the company at that time. As to the circumstances of Mr. Salgue's application for insurance and what connection, if any, I had with it, my recollection is a little indistinct as to the Prudential. My recollection, however, is about the first of June, Mr. Adams, representing the Prudential Insurance Company, came to my office to collect an insurance premium from myself, and the question of insurance came up, and Mr. Salgue came into the office about that time, and he had been talking about taking out some insurance, and I just suggested to Mr. Adams he might write him a policy. Yes, sir; I had some insurance myself in Mr. Adams's Company. As I understood Mr. Adams' testimony, it was that I sent for him to see Mr. Salgue to secure a policy; I have stated my recollection; he was in my office and I merely suggested to him that he might be able to write Mr. Salgue. At that time, Mr. Salgue was earning about five thousand dollars a year; his fixed salary was three hundred dollars per month and then he had an interest in the profits also, which amounted to about five thousand dollars. At the time he spoke of thinking of taking out some insurance, his health was good, so far as I know; he was a strong, robust man; I did not know he ever had a complaint. He had been working for my company about four years, up to that time. As to whether he had had any sickness of any consequence during that four years, my recollection is, in the spring, either January or February, 1905, he had a slight bilious attack, and that he lost two days from his work. Up to the time he applied for insurance, the total amount of time that he lost from his work by reason of sickness or poor health was two days; yes, sir; in the whole four years he worked from twelve to sixteen hours a day. His work

was in the brick mill and in the clay hole; he was general superintendent, and he looked after all of it. The clay hole is in the swamp near the city; the mill itself is located in the
191 city limits, just in the edge of the swamp. We hauled our clay about a mile at that time. Yes, sir; the work was largely in the swamp and in this clay hole. Yes, sir; I think the work he did was such as required vigor and strength and a healthy man to do. He was a very energetic man, and if he found a piece of work that was necessary to be done, he did not mind staying all night to do it, to have the mill in shape to run the next morning. As to what led up to the bilious attack he had, the two days' sickness, and what time of year that was, I can only give you my opinion about it; it was having worked in the clay hole in the winter; my recollection is it was in January or February. As to the character of the work that he had to work on all night, our steam shovel was submerged; we had had a freshet in the river; he went down to build a cofferdam to make the hole smaller, so as to have less pumping to do, and he remained there over night at the clay hole working to get the steam shovel out; he wore a pair of rubber boots up to his waist, and he was there in the water all night. Yes, sir; he was working in the water. As to whether I was present at the time Mr. Adams wrote the application in the Prudential on Mr. Salgue's life, that is not clear to my mind; I am not sure about it; I was present when Mr. Adams was trying to persuade him to take the policy. As to what Mr. Salgue told Mr. Adams at that time, my recollection is that he told Mr. Adams that he would like to increase his insurance, that he had been talking to me on the subject of insurance, and that he had about four thousand dollars, and he would like to make his line ten thousand dollars. Yes, sir; he had been talking to me about insurance. As to what he said about other applications, to other companies, he said he had made applications in several companies, the different life insurance agents had been very persistent in writing him a policy, and that his mind had become clouded on the subject, he did not know what he wanted. He said, now, if you gentlemen want to write me, you can get your policies and bring them here and I will stretch them out on the desk and read them over and I will accept those that suit me. Yes, sir; that was when Mr. Adams was trying to persuade him to let him write this application. Yes, sir; Mr. Charles Adams, the gentleman who testified here. Yes, sir; I was present at the time Mr. Hawkins and Mr. Ray came out there to write the Aetna policy. As to what occurred at that time, I think on July 6th, 1905, I was going to Forsyth. I was called there to visit my sick mother, and I met Mr. Ray on the train, Mr. Bol-
192 ivar H. Ray. We walked into the smoking car, and Mr. Hawkins was introduced to me by Mr. Ray, and during our conversation, they being interested in insurance the insurance question came up, and they undertook to write me, or try to persuade me to take a policy with them, and I told them I had all I could carry. I think I suggested to those gentlemen probably they could write our superintendent, if they would go down to see him, that I thought he was considering taking out some insurance, and I stated the amount he

wanted was six thousand dollars. Well, I returned to Macon on Friday night, and on Saturday morning when I reached my office, Mr Ray and Mr. Hawkins were there. I think that was the 8th of July, to the best of my recollection, and my recollection is they were standing out in the yard, talking to Mr. Salgue. When I drove up to the office, they all came into the office and were still discussing life insurance, and these gentlemen were very persistent in trying to get him to take a policy in their company, and he said to them that he had applied for other insurance, and he only wanted six thousand dollars. He said, however, "If you will agree to do it, you can write your policy out, or have your policy written and send it here, and I will spread it out on the desk and if it suits me I will take it;" he could tell more by reading it than by talking to them, and he said he would accept it if it suited him and if it did not he would not. Yes; he said other people had written applications for him. I don't know that he stated who. As to what occurred then, he said, further, "I don't think I can get life insurance, anyhow; Dr. Little has stated I had heart trouble," or words to that effect. He said he thought Dr. Little was mistaken, that he was as strong as he ever was in his life. Mr Haskins said: "That is a question for our physician; he can settle that mighty quick." Mr. Ray went to the phone and telephoned Dr Barron; it happened he was not in his office, and then he called Dr Harrold; Dr. Harrold was there in about fifteen minutes. Yes, sir; I was present when Dr. Harrold came. When he came in these gentlemen stated they wanted him to examine Mr. Salgue for life insurance, and Mr. Salgue stated to Dr. Harrold what Dr. Little had said to him, and my recollection is Dr Harrold's remark was: "Just shuck off, old man, and I will find out whether there is any trouble with your heart or not." I understood him to mean by that to take off his coat and vest. Yes, sir; I was there when Dr. Harrold got through examining him. 1903 he took him in the adjoining room; I think the answers to his questions were writen in my office; that is my recollection; he did take him into the adjoining room for the physical examination. No, sir; I did not go into the adjoining room while the physical examination was taking place. Yes, sir; I was there when he came out in the adjoining room after the physical examination. Dr. Harrold's statement then, as well as I remember was: "I will stake my reputation as an examining physician, there is no trouble with your heart; if you have heart trouble, I also have." As to what occurred with reference to Mr. Salgue signing any papers or giving my notes, my recollection is that Mr. Ray was writing out this application, and some of these questions came up and the doctor decided about this heart trouble, and Mr. Ray said: "I will answer it no,' because the doctor said no." And after the application was written, one of them went over to my desk and wrote out a paper, nd they stood at the book-keeper's desk and wrote a paper. I did ot know what it was. I was not interested in the matter, and he sked him the question, if he wanted the policy to go into force at nce, and he said what he did before, he did not know, "if it suits e I will take it; if it don't, I won't." But the papers were signed.

it seems, and the first I knew he had signed a note, about the 20th. I received the policy and the note from Mr. Hawkins, with a letter to please send him a check to the amount of the insurance. As to whether I looked for the original letter I got from Mr. Hawkins, I don't think I kept it at all; the matter was settled in a few days after that, and I did not preserve the letter; it was not appertaining to our business. As to the contents of the letter as well as I remember it, he just wrote me to please send him my check, is my recollection, for the amount of Mr. Salgue's note, and enclosed the policy. My recollection is the letter and policy were addressed to "John T. Holmes," and in the same mail I had a letter from Mr. Hawkins, saying the letter was there, and it was intended for me. Yes, sir that was the letter I got. As to what was done then, I was surprised in finding the note there, after the conversation in my presence. I went to the office and saw him, and asked him if he had signed this note for the life insurance premium. He said "no," he had not. I showed it to him and he said: "Why, I thought I signed a receipt here for something for these people; I did not sign any note. He was very angry, and my recollection is he refused to pay for it.

No, sir; my recollection is not entirely clear as to whether I
194 got another letter from Mr. Hawkins, or not. My impression is, Mr. Ray came to the office again to try to persuade Mr. Salgue to take this policy. I am not entirely clear on that point. As to what was finally done, I had quite a talk with him about it, and he refused absolutely to pay it, said he would not have it. I told him: "You perhaps did not know you signed a note, but you have; here is the note; these people can sue you and make you pay it, in my opinion, and rather than have a law suit, I believe I would pay it." He finally agreed to, and I mailed the Company's check to Mr. Hawkins for the amount. I want to state that it is not my check; that check is a check of the Bibb Brick Company's. I was an officer of the Company, and this amount was charged to Mr. Salgue's account, on the books of the Company, where he had his salary account. As to what occurred with reference to the delivery by Mr. Adams of the policy in the Prudential Insurance Company, my recollection is Mr. Adams came out with the policies, and he had two policies, what is called a participating and non-participating policy; the premium on one was a good deal more than on the other, and when he brought them down, Mr. Salgue told him he believed he did not care for them, he would not accept either of them, and I think it went along a week or ten days before, perhaps, he finally agreed to take them, and I stated to him I thought Mr. Adams was representing a good company, and I believed if I was him, I would take the policy, and I know it was through my persuasion he finally agreed to take it. As to what Mr. Adams did, in order to get him to take it, as to the premium, I think he divided the commission with him; that is my recollection. The amount was paid Mr. Adams by a check of the Bibb Brick Company. I do not know anything about the circumstances about the delivery of the policies of the Sun Life. I know that Mr. Anderson Clark came out there, and was trying to deliver him a policy. As to whether Mr. Salgue took both of those

policies at once, or whether there was any considerable delay about them, my recollection is that those policies were written about the 28th day of June; I am not clear on that; in fact, all of those applications were within a week or ten days of each other, is my recollection. The man was besieged by life insurance agents out there, and it got to be very annoying to him to have those people out there and stopping him from his work, not only at the office, but at his home at night. As to whether he refused to take either of the policies in the Sun Life until some months later, my recollection is they had two policies of three thousand dollars each, and that he took
1957 one on presentation, and the other was held over until November, and I think Mr. Holland, who was representing the Sun Life at that time, took this to him, and told him that was the last day he had, or something like that, and he wanted him to take it. Yes, sir; Mr. Holland is here in Court; that is the gentleman over there. That was either October or November after he had taken about the first of July, before he took them. As to whether he took all, or refused to take some, he refused more than he took; my recollection is they wrote him for about forty thousand dollars. The ones that he finally took were the Sun Life, the Prudential and the Aetna I think it was six in the Sun Life, six in the Aetna and five in the Prudential. Now, the Provident Savings, I had better say about that Company; it seemed the agent of the Provident Savings at that time was a Mr. Ross, who was killed on a train near Milledgeville, he fell off the train, or something, and was killed. He tried to deliver these policies to him, and he did not take either of them. I think he tried quite a number of times. My recollection is those policies were three thousand dollar policies; they were written and sent out, and he did not accept either of them. They were sent out by Mr. Ross. During the time these policies were being applied for, those that were taken out and rejected, Mr. Salgne's health was good, so far as I know. As to what his appearance was, as a healthy man in June or July, 1905, and the balance of the year 1905, I considered him as strong and robust as any man I knew; he was a very stout man physically. As to whether he was able to do steady and continuous work, I think he did more work than any man connected with the brick yard. As to his appetite in June and July and after that time, during the year 1905, he had a very ravenous appetite. I know I have remarked to him quite often, as his dinner was sent to the office—he did not go home to dinner—and I frequently told him he ate enough for dinner to last him a week. No, sir, there were no signs of indigestion during that time, that I know of. No, sir; he never made any complaint of indigestion or stomach trouble while he was eating those big meals, or any other time. No, sir; he never complained of any shortness of breath, or pain in the side. No, sir; he never complained of any pain in his stomach, until up within two or three weeks of his death. Yes, sir; 1906 was the year of his death; the 27th day of May. As to what occurred during the year 1906, in Mr. Salgne's work out there, preceding this trouble with his

health, I remember about the first of May, we were just com-
196 pleting a dry kiln, and we had some fitting for it shipped in,
and among them was a barrel of buts and bolts in the ship-
ments, and this barrel was about a fifty gallon barrel, as I remember,
a syrup barrel, or oil barrel, or something of that kind, and these
fittings were shipped in it, and in unloading that they threw it down,
and the head busted out, and Mr. Massee and I came through the
yard about that time, and Mr. Salgue, Mr. Massee and myself were
walking there, and he passed this barrel, and he said to a couple of
negroes: "Head that barrel up; those nuts are being wasted." They
took hold of it, and did not seem to be doing anything with it. He
was a very impetuous man, and he said, "Get out of the way, and let
me do it." And he headed it up himself. Those fittings were made
of iron. It was lying down on its side, and he lifted it up and set it
on one end. That was along, as well as I remember, near the first
of May, 1905. As to the result of his picking it up, after that, Mr.
Massee remonstrated with him about it; he said: "We don't want
you to do that sort of work; we have negroes here for that purpose,
and we want you to take a rest." He said: "I am thinking about
going to the Springs." Mr. Massee said: "All right, go ahead, and
the Bibb Brick Company will pay your expenses." Yes, sir; after he
headed that up, he complained of pain; in about a half hour after
that, he came to the office, and sat on the steps, and complained of a
pain in his chest. He never was well after that. No, sir; he had
never complained to me of any pain in his chest, up to the time he
listed that barrel. As to the character of work he did, in the day
time or night time, during the early part of 1906, or February,
1906, we had the same experience we had in 1905, the steam shovel
being submerged in the clay hole. Mr. Salgue spent the night in
there again; he went into this work about noon one day, and he
came out at seven o'clock the next morning, and he told me he had
not had a mouthful to eat, he had worked all night and day and
just got it out. I think that was about the first of March, 1906. No,
sir; he did not have any trouble after that, to cause him to consult
a physician, to my knowledge; he may have consulted them; the only
complaint I know was after his having lifted this barrel of fix-
tures; then he continued his work up to a few days before he died.
As to the time that intervened between the time he lifted that barrel
and his death, this was in early May, and he died the 27th of May.
My recollection is, about ten days before he died, he decided he
would go to the Springs, Indian Springs, my recollection is, it was
Wednesday afternoon, he came to the office and said: "Mr.
197 Moore, my work is finished; we have been at work on this
brick yard five or six years; it is at last completed, and I
want to go now and take my rest." I replied to him what Mr. Mas-
see had suggested some days before, that the Company would pay
his bill, to go to the Springs and rest. He went on Wednesday, is
my recollection, and returned to Macon Sunday night or Monday
morning. He was at work, and remained there until Thursday of
that week, and returned to the Springs, and on Sunday night about
eight o'clock I was telephoned from the Southern depot down here.

that Mr. Salgue was on the train dead. I was acquainted with Mr. Salgue about five years. Yes, sir; I was acquainted with his character. As to his general character as to honesty and integrity, I think he was one of the most honorable men I ever had any dealings with.

Cross-examination.

By Mr. BLACK:

As to whether it was about June 1st or July 1st that Mr. Adams came out there in reference to the Prudential application, the reason I said June 1st, my premium is due about June 1st. Yes, sir; there is thirty days' grace on any premium; sometimes we take it, and sometimes we do not take it. As I stated, I think it was about June 1st; that is my recollection; I think Mr. Adams made several trips to the office out there, to write him. To the best of my recollection, it was about June 1st. As to my stating that at the time Mr. Adams was there, Mr. Salgue stated he would take all of those policies when they came out, and lay them on the desk and read them, and select the ones he wanted, that was one of the things I wasn't clear about; there were so many of those insurance agents sent out there. That was his final decision, he would spread them out and read them over and accept those that suited him. No; I can't say positively whether he stated that to Mr. Adams, or not; to the best of my recollection, he did. As to whether that recollection is based on the fact that he stated that to the other agents, and I presumed from that that he stated it to Mr. Adams, I have answered that the best I can. To the best of my recollection, he stated that to Mr. Adams. As to having answered it both ways, I don't know whether he stated it to Mr. Adams; to the best of my recollection, he did. This was four years ago. As to my recollection being vague as to the Prudential, and my not remembering whether he said that to Mr. Adams, 198 and whether I am saying he said that to Mr. Adams because I heard him say it to those other gentlemen, the best of my knowledge and belief is, he said it to Mr. Adams. Yes, sir; I said just now that my recollection was vague, and now I state my recollection is not vague. No, sir; nothing has just happened in the last minute to refresh my recollection.

By Judge MILLER:

Yes, sir; I stated there were a great many people out there trying to write insurance on Mr. Salgue's life, and he refused more than he accepted. Yes, sir; I still think that. No, sir; I am not able to recall all the numbers and names of the various companies, because I do not know the companies those people represented. I happened to know about the Prudential Savings, on account of the death of Mr. Ross at that time. As to whether the Penn Mutual application was sent out, about June 30th, I don't know; I know Mr. Anderson Clark was out there trying to write Mr. Salgue insurance, and that time, I think he represented the Penn Mutual Life Insurance Company. Yes, sir; I think he came back afterwards for the Sun. Yes, sir; I think he came first for the Penn Mutual, and afterwards came

back for the Sun. I think a man by the name of Nowell came first for the Sun Life, and finally Mr. Anderson Clark came with him; I don't know who they were working for. Yes, sir; according to my recollection, the Sun Life issued two policies of three thousand dollars each, and one Salgue took about that time, somewhere in June or July, and the other, to the best of my recollection, he took in October or November. Yes, sir; in that case he accepted about six thousand dollars; you understand, he accepted three thousand dollars of this insurance, my recollection is, about ninety days after the policy had been written; he took three thousand dollars of the insurance of that Company somewhere in June or July, immediately after the application, and my recollection is he accepted the last one, he said Mr. Clark had been very clever to him, and he felt like he ought to accept his policies. Yes, sir; that was just before it ran out, in October or November. Yes, sir; together, he accepted six thousand dollars in the Sun Life. No, sir; he did not accept a policy for six thousand dollars from the Prudential—five thousand dollars. Yes, sir; he accepted a policy of six thousand dollars from the Aetna, because he had to. This is a fact. As to whether he had, at that time, two thousand dollars that had been written some years before in the Prudential, and two thousand dollars in 1909 the Mutual Life, my recollection is that he had two thousand dollars in one company and a thousand dollars in the other; I don't remember which. I know he made the statement that he had four thousand dollars of insurance, but after he died, I didn't find but three. Yes, sir; I had the idea at first, when I spoke to Ray and Hawkins, that he wanted to raise his insurance up to ten thousand, increase it from four to ten, yes, sir, and for that reason, he needed six more, whether he got it in one policy, or more. No, sir, the Provident Savings policy did not come too late; he did not accept it. Yes, sir; he refused that. As to whether he had a chance to refuse the Penn Mutual, I don't think any application was ever filed for insurance in the Penn Mutual, at least, not to my knowledge, I don't know anything about that; I did not know anything as to the Penn Mutual; I only know the statement Mr. Salgue made to me when he returned from Dr. Little's office. Yes, sir; my impression is that his application for insurance in the Volunteer State Life was rejected or turned down by Dr. McHatton; It is my impression that I did not know that until about thirty days after this other insurance had been applied for; I saw the notice sent out from the office in Chattanooga, that he had been refused insurance in the Volunteer State Life. Yes, sir; I think it is true that Dr. McHatton, the medical examiner, put him through the medical examination, and made an unfavorable report, and Mr. Salgue did not get the policy. Yes, sir; it is true that he got seventeen thousand, Aetna six, Sun Life six, making twelve, Prudential five, making seventeen thousand dollars. As to his not having been rejected himself by the Penn Mutual, and his not having himself rejected the Volunteer State, and out of all the companies, he only rejected the Provident Savings, I said that out of the policies written, there was no policy written by the Penn or the Volunteer State; he did

not have any opportunity of rejecting them. Yes, sir; out of all those, he rejected only the Provident Savings, and accepted the rest. Yes, sir; those are all the policies I know about. The agent of the Provident Savings then was Mr. Ross. No; I don't think he was dead when they came. No; I did not say that before the policies came out Ross was killed between here and Milledgeville; while they were pending, and they were trying to persuade him to take it, Mr. Ross was killed. I don't know, but it seems to me like a man named Wilson took it up; I am not clear on that; my understanding was that they sent out four different policies for six thousand
200 dollars each, and therefore he turned down more than he accepted. Yes; I think I saw all of those policies; he had quite a stock of them. As to the exact language of what I heard Salgue tell Dr. Harrold about what Dr. Little had said, and whether I spoke to Dr. Harrold, or Mr. Salgue spoke to him; Mr. Salgue spoke to him; it was in my presence, when Dr. Harrold walked into the office, Mr. Hawkins and Mr. Ray stated they wanted him to examine Mr. Salgue for life insurance; Mr. Salgue then made this statement, that Dr. Little had said to him, that you have got some heart trouble, "I think Dr. Little is mistaken; I am as strong as I ever was in my life." Yes, sir; that was what Salgue said. Dr. Harrold said: "Just shuck off here, old man, and I will find out whether there is anything the matter with your heart." He took him into the next room, and gave him a physical examination, as I understand. As to what I heard Salgue state to either Ray or Hawkins, as to what Little had said to Salgue; Mr. Salgue was sitting in the window, and I was seated at my desk, it was a matter I was not concerned in. I heard the conversation; they were trying to write a policy; they were very persistent in it; there was absolutely no chance for a man to get away from them; he told them Dr. Little had advised him that there was some trouble in his heart, and he said: "I am as good a man as I ever was; there is absolutely nothing the matter with me." One or the other, I think Mr. Hawkins, said: "That is a matter for our examining physician; he can determine that matter. Yes, sir; that is as near as I can recall the words.

By the COURT:

Yes, sir; I testified that I was acquainted with Mr. Salgue's general character, and that it was good. Yes, sir; his general character for integrity was good. Yes, sir; I know that to be true.

E. H. HOLLAND, sworn for the plaintiff, testified as follows:

Direct examination.

By Dr. WIMBERLY:

Yes, sir; I was agent for an insurance company during the time Mr. Salgue was making application for insurance, in 1905—the Sun Life of Canada. Yes, sir; I was subpoenaed by the de-
201 fendant in this case. Yes, sir; I delivered one of those policies. It was in the latter part of September that I delivered

that one, about the 28th or 30th, I think. No one sent me out the to make that delivery; I was the representative of the Company this place. I had the policy that I delivered to Mr. Salgue abo three months before he consented to take it. I only went out the one time, trying to persuade him to take it, before he finally co sented to take it. No, sir; I don't know how often Mr. Clark w out there.

No cross-examination.

JORDAN MASSEE, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; I knew Mr. Salgue in his lifetime. I had known hi about four or five years. I was vice president of the Bibb Bric Company, and owned about a half interest in it. Yes, sir; he wa Superintendent. Yes, sir; I was acquainted with the man's genera character, from my connection with the company and my knowl edge of him. His character for honesty and integrity was abso lutely good; he was sought after by every brick company in the South, trying to take him away from us, all the time. Yes, sir; I remember the time he took out some insurance about July, 1905 I think that whole thing started from the fact that Mr. Moore and I were in the office in his presence, discussing a joint policy to be to be taken out by Mr. Moore and myself, and Mr. Salgue said he wanted some. I informed all the insurance agents, a friend of mine to take it up with him, among the number Mr. Collier, and he called, and I tried to persuade him to take Mr. Collier's policy, if he had to turn somebody else down. Yes, sir; the insurance agents were there Yes, sir; they were very persistent. As to his health at that time, he was the strongest and most robust chap I ever knew in my life. He had not lost any time during the four years he had been at the brick company up to that time, two days maybe. During 1905, his digestion and appetite were all good, so far as I know; I never took but one meal with him, and that was up at Mr. Moore's in Monroe County; he had a pretty strong appetite. No, sir; I never
202 heard him complain once of any stomach trouble, or give any indication of dyspepsia or stomach trouble, or indigestion of any kind. No, sir; he never did, 1905 or before 1905, complain of any heart trouble, or shortness of breath, or feeling tired; on the contrary, he worked from twelve to twenty hours a day. He was General Superintendent, but his principal duties were straightening out our troubles, the difficulties in the clay hole; the freshet cut through our clay hole and submerged the steam shovel, and he was in the clay hole a good deal of his time. Yes, sir; that was down in the swamp, about a mile from the works. Yes, sir; I remember times in 1905 and '6 when we had such freshets. As to what time they occurred during those two years, in January, my recollection is we had five, we had one the last day of December, and in January and February, 1906; I looked it up. During 1905, at the time he lost two days from his business, it was clay hole work that preceded

that. As to what he did in the clay holes in 1906, we had continued trouble down there with freshets, and he worked down there sometimes every night all night. Yes, sir; I remember his lifting a weight; that was just before he died; we were finishing the steam dryer, it was the last one; we were finishing the steam dryer; we had been delayed waiting for some fittings, and a keg of fittings came, and I saw him head up the keg of fittings two or three convicts had failed to do. The reason it impressed itself so strongly on my mind was, I was just back from Dr. McHatton's office from an interview with him, and seeing this man make a strain after what Dr. McHatton had said, I was impressed by it. I went to Dr. McHatton on my own business, and in the conference he made some statement about Mr. Salgue, and when I went to the office, he and Mr. Moore were coming up, and he was in front of his dry kiln, and I saw Salgue head up this keg of spikes; it must have weighed seven hundred to a thousand pounds. As soon as he finished that, I took him up to the office, and said what McHatton said to me. If I had not known Dr. McHatton so well, I would not have told him. I told him what Dr. McHatton said, he must absolutely cut out that kind of work, we were willing to pay his salary and let him walk around the yard, and I finally wound up by saying you will finish this kiln in a day or two, and he could go up to Indian Springs for a rest; I suggested that the company would pay his expenses and send him to Indian Springs for a rest. Yes, sir; I heard him complain after making that lift, but he would not admit there was anything the matter with his heart. No, sir; he never did complain of any trouble until after that lift.

203 Cross-examination.

By Judge MILLER.

As to whether Mr. Salgue, on a previous occasion, took a trip to Richmond, I think he took one or two trips while he was with us, on a short vacation, no illness connected with it, so far as I know, that caused it.

By the COURT.

Yes, sir; I should think the work he was engaged in would be very unhealthy, down in the swamp there; that is the general impression. The clay pit is back of the brick plant, about a mile over in the swamp. The clay pit is about half a mile from the river, or maybe three quarters. As to the distance from the Central Railroad tracks, it is not in that direction; it is nearer the Southern Railway track; the plant is about three or four hundred yards from the Southern Railway track, and the clay hole is about half a mile back of that in the swamp; there is considerable stagnant water there, and Tracy's Lake is over there. Yes, sir; Tracy's Lake is stagnant water. Yes, sir; part of the clay pits fill with water, those that have been abandoned, and those left by Blake and Charlie Harris have a considerable water. Yes, sir; there are mosquitoes in that part of the world. Yes, sir; the seepage, or drainage, or garbage form the city extends down in that direction; the canal runs between our

office and our clay hole, the city canal that drains this part of th swamp. Some sewerage accumulated in it; the main sewerage cana empties into the river in another place. Yes, sir; I was intimate wit Mr. Salgue; I was there every day. No, sir; I never heard him mak any complaint about chronic acid gastritis; I was thunderstruck when Dr. McHatton made the statement to me that the man was ill It was about three weeks before he died, he told me about his heart No, sir; I never heard him make any complaint about any heart trouble, or shortness of breath whatever. Two days time is all I can remember that he lost in the four years. As to what he had to do, he could fill any man's place on the works; I have seen the locomotive engineer fail to show up, and he would jump on the locomotive and run that; and I have seen the fireman fail to show up, and he would do that. Yes, sir; I have seen him shovel clay, and fire a kiln. By firing a kiln, I mean burn brick; that was his long suit; he was an expert brick burner. By long suit, I mean he was better fitted for that than anything else. I have seen him fill all of the positions on the place.

204 J. J. COBB, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; I knew John A. Salgue in his life time; I had known him, I suppose, between three and four years; I can't say positively. Yes, sir; I knew his general character. His general character for honesty and integrity was exceptionally good, I thought. Yes, sir; I knew the general character he bore; I saw him quite frequently when he was here.

J. N. NEEL, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; I knew John A. Salgue in his life time. I suppose I had known him three or four years, or longer. Yes, sir; I knew his general character in the community for honesty and integrity. That character was very good.

GEORGE WATSON, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; I knew John A. Salgue during his life time; I had known him for two or three years, I think, before his death. Yes, sir; I knew his general character for honesty and integrity. That character was first class.

W. J. YARBAROUGH, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

I live now at 2801 Second Street, on the New Houston Road. I am Master Mechanic for the McCaw Manufacturing Company, or
205 the Proctor & Gamble Company, it is now. Yes, sir; I knew Mr. John A. Salgue in his life. He was a neighbor of mine. I expect we were more intimate than any other neighbors; our work was kind of in the same line. I had the same position at that time, with the McCaw Manufacturing Company. Yes, sir; I knew his general character for honesty and integrity; he was a perfect gentleman; that character was good.

E. L. REEVES, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

I live at 1928 Second Street. I am foreman of the plant of the Central Manufacturing Company, at present. Yes, sir; I knew Mr. John A. Salgue in his life time; he was my neighbor about twenty or twenty-two months before he died, lived right across the street from me; I was very intimate with him for that length of time. Yes, sir; I knew his general character for honesty and integrity; that character was good. Yes, sir; he was a healthy man, had very little sickness.

Mrs. JOHN A. SALGUE, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; I am the widow of the late John A. Salgue. I reside in Richmond, Va. I was married to Mr. Salgue in 1900, November the 21st. I was married to him in Richmond, Va. From the time I married him to the time of his death, we lived in Suffolk, Va., in Macon, Ga., and in Rome, Ga. At the time of his death, he was living in Macon, Ga. He had been living in Macon between four and five years. His health was good up to a short time before his death. In 1905, his health was good. No, sir; he was not sick at all during the year 1905. The year before he died, he lost about two days from his business, from a bilious attack. That was along about February or March. Dr. Ross was out there at our house once or twice. No, sir; Dr. McAfee was never out there, to my recollection. No, sir; he never complained of being tired, or short breathing, or
206 pain in his chest, at all, during 1905. He had a perfect appetite. Yes, sir; his food agreed with him. His sleeping was good. No, sir; there was no sign of sickness or trouble with his health at all during 1905, except the two days I spoke of. Prior to 1905, during my entire married life with him, it was always good. Yes, sir; he was a healthy man. Prior to 1905, he was

a well man. He died on May 27th, 1906. He complained of trouble between two and three weeks before he died. Yes, sir; I remember how the trouble started; it started from lifting something heavy at the brick yard. No, sir; I never heard him complain of any pain in his body prior to that time. It was in May that he first complained of pain from lifting something heavy at the brick yard. No, sir; before that lifting at the brick yard, he did not make any complaint of any pain in his body, or of his heart troubling him, or of his breathing, or of any trouble with his heart, at all. Yes, sir; I know what sort of work he did there, in the early part of 1906; they had a freshet down there and he had to work sometimes night and day. No, sir; he did not come home at night, at all. That occurred the last of February or the first of March, 1906. His health was all right after he got through the freshet. No, sir; he did not have any heart trouble following that. No, sir; did not have any stomach trouble at all during 1906. No, sir; he had none in 1905. Yes, sir; I know something about the writing of insurance on his life. As to what I know about it, I know I was worried many times with agents, when Mr. Salgue returned home at night, they would be sitting on the porch waiting for him, and he sometimes would have to wait an hour before he could eat his supper, so they were very worrying to me. That state of things kept up two or three weeks, or more; I remember some of their names, but not all. Yes, sir; I and my two children live in Richmond

No cross-examination.

207 JOHN T. MOORE, plaintiff, recalled, testified as follows:

Direct examination.

By Mr. WIMBERLY:

Yes, sir; this is the check with which the amount was paid to Mr. Adams for the first premium. Yes, sir; $150.00 was what Mr. Adams charged Mr. Salgue for the first year's premium; that amount was charged to Mr. Salgue on the books of the Bibb Brick Company. Yes, sir; that is the amount the Company charged for the first year's premium, the amount they accepted.

Cross-examination.

By Judge MILLER:

Yes, sir; Mr. Salgue bore the relation to me of employee of the Bibb Brick Company, and Mr. Massee and I were his employers. No, sir; it was not the company that looked after the payment of it, and simply charged his account on our books; Mr. Salgue asked me to give Mr. Adams the money, and I gave him the Bibb Brick Company's check. Yes, sir; the account he kept with the Company was charged with that amount, as an advance by the Company.

ATLANTA, GA., 8-2-'05

Mr. John A. Salgue, c/o Bibb Brick Mfg. Co., Macon, Ga.

DEAR SIR: I beg to thank you for your remittance of $169.44 which I have just received from Mr. J. T. Moore. I still want to say that you have taken the very best contract that you could get for the money in my opinion and in order that you may not misunderstand the contract we have written you, I wish to make the following statements: First—We are writing you $6000 insurance for $169.44 a year, which is $5.76 a year less than the Prudential would have charged you for $5000 Participating insurance. Now, in five years that means a difference of $28.80; at the end of the fifth year the Prudential cash surrender value is $365.00, while our cash surrender value amounts to $312.00, but as you have paid the Prudential $28.80 more for the protection for five years,
208 for only $5000, and have had $1000 additional protection with us over and above the amount you have had with the Prudential—which to say the least is worth $75.00 our cash value would run to a total to you of $415.00 against their value of $365.00. At the end of the tenth year, I find that our cash value is $900.00 against their value of $885. At the end of the fifteenth year, our cash value is $1536, and the Prudential $1450. At the end of the twentieth year our cash value is $2202, while the Prudential is $2035.

Now, should you surrender your policy at the end of the twentieth year you have guaranteed you about $167 more cash value than the Prudential, having saved about $5.76 in premiums a year, which amounts to $115.20 and having had given you $1000 additional protection for 20 years which, at the Low Te-m rate of $15, amounts to $3000. Therefore, our policy at that time is practically to you worth $582 more than the Prudential.

At the end of the twenty-fifth year I find that our cash value is $2864 against the Prudential cash value of $2565, add difference of $300, so that the only time the Prudential's policy is more valuable in case of surrender is during the first few years of the contract, and those values are not actual when you consider that you are paying us $5.76 a year less money and have $1000 more protection.

I have gone thus into detail with you, in order that you may appreciate that every statement we made to you was in the utmost good faith and that you may be entirely satisfied with your contract, and become one of our persistent policy holders.

With kind personal regards, I am,

Yours very truly,

W. E. HAWKINS,
Manager.

MACON, GA., *July* 8th, 1905.

Mr. J. H. Huntington, Jr., Mgr. Ordinary Policy Dep't, Newark, N.J.

DEAR SIR: I mailed you on the 6th, inst., application of J. A. Salgue for $5,000 Whole Life Participating insurance. Since that time a competitor has gotten hold of him and convinced him that

he should have Non-participating instead of Participating, and I beg to ask that you send out an extra policy, Whole Life Non participating, for him, together with an application ready for signature, and in case I cannot deliver the Participating Policy,
209 I will have him sign the application for the Non-participating and return the other, but I shall do my best to deliver the Participating policy. Please be as prompt in issuing this application as possible, otherwise I am afraid I will lose the business. Mr. Salgue is a good subject and already has $1,000 with us, 5% Guaranteed Twenty Year Endowment Bond.

Very truly,

C. M. ADAMS.
General Agent.

The following check was introduced by the plaintiff.

No. 103

MACON, GA., *July 29th*, 1905.

American National Bank of Macon, Ga.

Pay to the order of C. C. Adams $150.00, One hundred and fifty dollars.

BIBB BRICK CO
Per J. T. MOORE,
Sec. & Treas.

Endorsed on face: Paid Jul. 31, 1905. American Nat'l Bank Macon, Ga.

Endorsed on back: C. M. Adams.

The foregoing constitutes the proceedings, the testimony and statement of all the evidence introduced upon the said trial and both sides having closed and before the Court charged the jury, the defendant, The Prudential Insurance Company of America, through its counsel moved the Court to direct the jury to return a verdict for the defendant in the following language:

"And now comes The Prudential Insurance Company of America, by its counsel of record, and moves the Court not to submit said case to the jury but to direct a verdict in its favor upon the ground that the evidence introduced upon the trial of said case, with all the influences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff and demands that a verdict shall be directed in its favor.

(Signed) McDANIEL, ALSTON & BLACK,
Attorneys for the Defendant The Prudential Insurance Company of America.

216 The said motion for the direction of a verdict was overruled by the Court and said instruction refused, to which said ruling of the Court the defendant, The Prudential Insurance Company of America, then and there duly excepted which exception

was duly noted and allowed by the Court, such exception so presented and allowed being that such instruction should have been given upon the grounds presented therefor, and defendant, The Prudential Insurance Company of America, hereby tenders this its bill of exceptions to the Court to sign and seal and the Court does hereby sign and seal the same.

Be it further remembered: That prior to the charge of the Court to the jury and to the argument of counsel, counsel for defendant, The Prudential Insurance Company of America, submitted in writing to the Court and requested the Court to give to the jury the following instruction:

"The defendant, The Prudential Insurance Company of America, requests the Court to charge as follows:

"Question B-4 of the application of said John A. Salgue to the said Prudential Insurance Company of America is as follows:

"Has any company or association ever declined to grant insurance on your life or issued a policy of a different kind or for a sum less than that applied for? (Answer 'Yes' or 'No.')

"The answer to this question is 'No.'

"The defendant insists that this answer is false and says that the said Salgue in the month of June, 1905, prior the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance and that this application was signed by the said Salgue and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, Examiner for the said Penn Mutual Company, for examination and that Dr. Little, as said Examiner, examined the said Salgue and stated to the said Salgue that he had heart trouble and for that reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by said Salgue, and if you believe from the evidence that such application
211 was made and that such declination was made, then I charge you that the answer of Salgue to this question was false and that it was warranted to be true and that it was as to a material matter which would tend to change the nature, extent and character of the risk assumed and that in this event plaintiff could not recover:"

which instruction the Court refused to give and thereupon, while the jury was still at the bar of the Court, the defendant, The Prudential Insurance Company of America, by its counsel excepted to the refusal by the Court to give said instruction which exception was duly noted and allowed by the Court, the grounds of said exception so presented and allowed being that the language of the request was a correct statement of the law applicable to the case; that the evidence showed that plaintiff had made application through Anderson Clark,

agent of the Penn Mutual Life Insurance Company, for insurance and that he had been informed by Dr. Little, its examiner, that he could not pass him, and that this was a declination by the Penn Mutual Life Insurance Company, of insurance to the said Salgue and that the answer of the said Salgue to the said question 4-B of his application to the said company was false and was material and tended to change the nature, extent or character of the risk about to be assumed by the said defendant company and that being such a false statement, the plaintiff could not recover.

212 Be it further remembered, That after the presentation of said request to the Court and after argument of counsel, the Court proceeded to charge the jury, said charge being in the following language:

Charge of the Court, May 21st, 1909

The COURT

GENTLEMEN OF THE JURY: The policies on which the plaintiff seeks to recover are contracts for life insurance. Life Insurance by a corporation imports a mutual agreement, whereby the company, in consideration of the payment by the person insured of a named sum, annually or at certain times, stipulates to pay a larger sum on the death of the assured. The company in determining whether or not it will insure takes into consideration, among other things, the age and health or the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, present physical condition, and past disease from which he may have suffered, and the premium exacted from him is determined by the probable duration of his life, calculated upon the basis not only of the past experience of the company, but of others engaged in the business of insurance.

Here, the contracts having been made, and the policies of insurance having been issued, the death of the insured having ensued and been proven, the plaintiff is entitled to recover, unless a lawful defense or defenses are made and supported by the proof, and the burden of proof is on the companies in the case of each policy, to show by a preponderance of evidence relating to the policies respectively that the insured has been guilty of some conduct which would defeat that right to recover.

By preponderance of evidence is meant that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the contention, rather than to the other.

In determining where the preponderance of evidence lies, the jury may consider all of the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunities of knowing the facts to which they testified and the probability or improbability of their testimony, their interest or

want of interest, and also their personal credibility so far as
213 the same may legitimately appear upon the trial. The jury may also consider the number of witnesses, though the preponderance is not necessarily with the greater number.

Where there are apparently conflicts in the testimony, you should, if possible, reconcile those conflicts and impute them, if it may be done, to honest mistakes in the observations or conclusions of the witnesses. But if conflicts are irreconcilable, you should cordially believe those witnesses, whose knowledge of the facts, and whose manner of testifying seem to your minds to best entitle them to belief. The interest and want of interest of the witnesses should also be considered by you in determining the credence to which they seem to be entitled. But the credibility of the witnesses, the value and the weight of their testimony is within the exclusive domain of the jury.

The applications of the Prudential and the Aetna, the defendants will be before you. You should consider them together with the policies of insurance. Both of the applications are made, by their language, a part of the contract of insurance, and you should consider all the declarations, statements and terms together, but the statements therein may not be of equal importance in their effect upon your duty.

You have heard much in the case about certain statements contained in the applications for insurance as constituting warranties. This is the contention of the defendants. The plaintiff's contention is that such statements in the applications are merely representations. In determining the nature and the effect of these statements in issue, you should understand the meaning of those terms, and the difference in their legal effect. A Warranty is a representation or promise set forth in the policy, or by reference incorporated therein, by which the terms of the policy is made an essential part of the contract, and the untruth, or non-fulfillment of which, it is agreed, shall render the policy voidable by the insurer, wholly irrespective of the materiality of such representation or promise. On the other hand, representations are statements made to give information to the insurer, and otherwise induce it to enter into the insurance contract, and unless distinctly material and made with fraudulent purpose, do not void the policy. Warranties in life insurance policies in view of the inherent nature of the contract, are not favored by law.

It may be well conceived by the Jury that the statements of an applicant for insurance, however sincere his purpose or unquestionable his character, may, so far as his health is concerned, not disclose
all the "ills that flesh is heir to." Many maladies may be
214 incipient. There may be the unconscious though subtle and inevitable influence of germs of the bacillus of lesion of aneurism, which in their progress may either rapidly or gradually result in death. Men are not obliged to expend any portion of their income or capital in life insurance. There are many other methods of investment by which they may secure a provision for those whose support and happiness is their concern. It is optional to invest in

farm lands and other real estate, in stocks and bonds in business e
in life insurance. Multitudes of men particularly, perhaps, thos
who work on stated salaries believe the investment in life insuranc
the most certain means of accumulating resources for their love
ones. If then such men act with purity and integrity of purpose,
their statements are truthful and sincere as they understand them
if yielding to the solicitations of life insurance solicitors competing
for the profits of the contract, and who not only submit the printe
questions, but write the answers with a view not to defeat, but t
accomplish, insurance, the applicant is led into mistaken representa
tions, these, when he has in life paid for his insurance and passe
away, are not to be treating as voiding the policy unless they are
so clearly and palpably material as to constitute a wrong agains
the insurance company, or unless even if less material, they are s
fraudulent in character as will make the charge of fraud so pre
ponderant that it must for the purpose of justice be deemed as vitia
ing the policy. It follows that where the parties to life insurance
contracts do not use express terms to denote that the truth of a state
ment is a condition precedent to the policy, even though the applica
tion is formally made a part of the policy, the court will not conclude
it to be a warranty without great and controlling reason. This is
the law. The fact then that a statement is referred to in the policy,
or even literally inserted therein, does not conclusively stamp it as
a warranty. Again, in case answers in the application are warranted
as true, the warranties will not be extended beyond the answers as
actually given, and only such statements as are strictly in answer to
inquiries contained in the application are held to be warranties. If
in the questions are responsible, or if the applicant is led into a
mistaken statement through the urgency or pressing solicitation of
their responsible agent or solicitor, such doubt should in common
justice be resolved against the company in determining whether such
answers are material, or whether they are to be held as fraudulent
and false with the result of vitiating the policy. Substantial
215 integrity of conduct on the part of both the insurer and
insured is the prime object the law seeks to obtain.

Again where statements are representations, they also are to be construed liberally in favor of the insured, and are required to be only substantially true. The law not favoring the doctrine of warranties in such contracts, it follows that wherever the jury is not justified, after consideration of the evidence (which, on such questions must preponderate in favor of the company), whether a statement is a warranty or a representation, such statement, if the facts of the case justify it, must be deemed to be a representation, and not a warranty. A warranty guarantees a statement to be true, whether it is true or not. A covenant, the language used in the Georgia Law, is merely an agreement that it is true. As otherwise expressed by high authority, a breach of warranty vitiates the insurance, though the insured made the warranty without knowledge of its falsity. On the other hand, all reasonable doubts as to whether statements inserted in or referred to in insurance policies are warranties or representations should be resolved in favor of

the assured—that is, the person in whose favor the insurance has been issued.

The law of Georgia, while reporting that every application for insurance must be made in the utmost of good faith, and that representations are considered as covenanted to be true, otherwise the policy will be voided, also provides that a failure to state a material fact, if not done fraudulently, does not void the policy. On the other hand, the wilful and fraudulent concealment of such a fact which would enhance the risk of the company will have the effect to void it. What is here stated to be true of wilful concealment, is also true of wilful misrepresentation by the applicant or his agent as to any material inquiry made. It follows that under the law of Georgia, a misrepresentation in statement or a concealment of fact must first be material, or must be wilfully or fraudulently made in order to annul the insurance.

I may further instruct you that as to concealment the courts of the United States hold that it, too, must be fraudulent in order to defeat a recovery on the policy. If the applicant has answered the questions asked in the application, he is justified in assuming that no further information is required or desired. If the agent of the company presents the application and writes down the answers of the applicant, he is deemed as holding the pen for the company, and if he is content to leave a question unanswered, the applicant may be justified in assuming that the query is unimportant, and that the company requires no further information on that
216 point. If, however, the applicant is purporting to answer a question gives only an incomplete answer, concealing the facts which should be properly stated in response to the question, and these concealed facts would increase the risk of the company, or are otherwise material, the policy is void, if such concealment is wilful and not merely an honest mistake or inadvertence. It is also true that a failure to disclose facts of which the applicant is ignorant, or which are immaterial to the risk, is no ground for voiding the policy.

These are the general principles. To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of which he had knowledge. If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance? From the respective applications. And third, in connection with the four inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done? In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant.

If, on the other hand, you find that there was misrepresentation or concealment of which Salgue had knowledge, that it was material

and would have influenced and controlled one or both of the
fendants not to issue the policy of insurance, and third, that it
a wilful or fraudulent misrepresentation or concealment, then
should find against the plaintiff and in favor of the defendant
the facts may relate to the policy under consideration.

From this instruction as to your duty, you will at once perc
that it is highly important for you to carefully consider all the
duct of Salgue, as disclosed by the evidence, relating to the man
in which the insurance was accomplished.

In regard to the application and policy of the defendant,
Aetna Insurance Company, you should especially consider the i
dents occurring in the office of the Bibb Brick Company, wh
Hawkins and Ray went there to get the application for that Co
pany. W. E. Hawkins was the manager of that Company
217 the State of Georgia, and B. H. Ray was its soliciting age

Both of these witnesses testified that Mr. Salgue, at the ti
the insurance was applied for informed them that a physician h
said he had heart trouble. Dr. Harrold, who was Examiner a
acted for the company, testified that Mr. Salgue informed him
the same effect at the same time. He also testified that Mr. Salg
told him one physician had said he didn't have heart trouble.
Harrold representing the Company then and there examined Salg
in the most careful manner, according to this testimony, assured hi
that he had no heart trouble. One witness, Mr. Moore, declare
that Dr. Harrold then and there said: "I will stake my reputatio
as an examining physician that you have no heart trouble." M
Hawkins then said, after Salgue made this statement, that the ma
ter would be left to the Company's physician. These agents the
immediately proceeded to write out, the one a binding receipt, an
the other a note for Mr. Salgue to sign. This having been don
he was informed that the policy would take effect from the date o
its issue. Some time thereafter, the note was sent by the Company
to Mr. Moore, Secretary and Treasurer of the Bibb Brick Company
with the request that he pay it. The policy was sent with the note,
and the note was paid and charged to Salgue's account with the
Brick Company. This evidence is all undisputed and is highly
important, particularly in connection with the manner in which
this insurance was solicited and pressed upon Salgue, and the hesi-
tancy which he manifested in accepting it, the disclosures as to what
the Doctors had said about his heart trouble, which he communi-
cated to the Agents and to Dr. Harrold, and the anger he exhibited
when he found he had been induced to sign a note, when as testified
by Mr. Moore, he merely thought he was signing a receipt. All of
this should be carefully considered by you in reaching a conclusion
as to whether or not he had a purpose to secure insurance by acting
in bad faith toward one or the other of these insurance companies,
as the evidence may relate thereto. In the opinion of the Court, if
you find the evidence that Mr. Salgue frankly informed both the
State Manager and the Local Solicitor of the Aetna Company, and
contemporaneously informed Dr. Harrold, their Medical Examiner,
that a physician had told him he had a heart trouble, but that he

did not believe it, and Dr. Harrold, then and there acting for the Aetna Company, gave him a careful examination, stripped him sufficiently and applied the stethoscope, could discover no heart trouble, and in emphatic language informed him that he had none,
218 and with the knowledge of these facts, the agent of this Company wrote in response to the appropriate inquiry, if he had any heart disease, the word "No," you may well conclude, if you are satisfied that the evidence justifies it, that Salgue had no purpose to fraudulently mislead the company as to that matter, and the Court is further of the opinion, if, in fact, you find under those circumstances the company reached an erroneous conclusion, you may, if you think proper from the evidence, conclude that it was even more at fault, through the action of its agents, than Salgue for the mistake, and if both acted with integrity and it follows that one or the other must lose, the party most at fault should be the loser.

Now with regard to the plea that Salgue had a mitral regurgitant murmur of the heart, I charge you, as a matter of law, that here the burden of proof is again on the defendants. The evidence must preponderate against the plaintiff before the defense can prevail, and if proof fails to satisfy you, to the extent which the law heretofore explained to you has defined, that John A. Salgue intentionally misled the defendant companies, or either of them, that he knew, or had reason to believe, that he had a material and serious disease of the heart which would seriously affect the probable duration of his life; if it fails to show you that he knew or had reason to believe that he had such a disease, and, thus knowing and believing, that he intentionally and fraudently withheld the facts from the defendant companies, or either of them, you would not be justified in defeating a proper recovery on this account as to such company with relation to which he was not guilty of such concealment and fraud.

With regard to the statement that he was in good health, if you believe that Salgue realized that he was not in good health, and had such a complaint or complaints, as he knew or should have known would probably shorten the duration of his life, and affect the chances of his being accepted by one or both defendants for insurance, and if he then stated wilfully and knowingly that he was in good health, and concealed the fact that he had a complaint or complaints which would seriously affect the risk of the company, then you should find as to the defendant or defendants to whom he made such statements or concealments that such defendants is or are not liable by reason of that statement or concealment. They are not liable because, if you so find, Salgue made the statement or concealment. But, if on the other hand, you believe from the preponderance of evidence that Salgue throughout the transactions with the
219 defendants acted with entire good faith, if he honestly believed that he was in good health, and had no such serious complaint as would materially affect himself as a risk for insurance, and if he in good faith made all such disclosures and answers to the questions propounded to him as he ought to have made, and if any misstatement or concealment was made inadvertently and honestly without intent to deceive and such misstatement or

concealment was not material to his value as a risk, then you would be authorized with regard to such circumstances to find against the appropriate defendant or defendants relating to whom Salgue was not guilty, and on such policy, if he was otherwise free of fault, Salgue's administrator would be entitled to recover.

With regard to the defense that Salgue replied "No" in answer to the question whether he had dyspepsia, when he had chronic acid gastritis, you should consider all the evidence as to how serious that complaint was, and how materially it would affect the risk of the insurance of Salgue. You may also consider whether Salgue from ignorance that dyspepsia and gastritis were the same thing, answered as he did. If his answer was in good faith, or if he had sufficiently recovered after his treatment by Dr. McAfee, that he could in good faith have answered "No" that he did not have "dyspepsia" at the time of that application, then that answer would not avoid the policy. If on the other hand, his answer was material to the risk, and was wilfully made not in good faith, when in fact he had "dyspepsia," and if you find that such complaint was material and would affect his application for insurance, then as to such policy you should find against the plaintiff.

As to the number of physicians who had attended him, as to previous illness, and as to other questions in the applications which you will find from the evidence, the Court charges you that the presence or absence of good faith on the part of John A. Salgue throughout would be exceedingly important to determine whether or not his omission to mention the number and the names was so material to his being accepted as a risk and of such fraudulent character as would void one or both policies, as the facts may appear in each separate case. If you are justified in concluding from the evidence that it was a mere case of honest forgetfulness or misapprehension, I charge you that it would not, in itself, render the policy void. If you believe that the insured was guilty of fraudulent concealment of the names and number of his Doctors, who contributed a variety of advice, diagnosis, medication, or lavage, for his assistance,
220 you ought to find against the plaintiff in either or both cases where you find such to be the case. But if you believe that it was an honest omission, and not material to the risk, or an inadvertently erroneous statement, you ought not to find against the plaintiff because he did not enumerate all of the medical men who had served him.

To sum up at this point the instructions in this case, notwithstanding its great perplexity, the multitude of witnesses and interrogatories, the true issue is this. Did John A. Salgue apply for any or both of these policies of insurance honestly and in good faith? Did he truthfully and sincerely communicate to one or both companies the answers to the questions propounded which were material for its protection? If he did so, withholding nothing fraudulently, concealing nothing fraudulently, and not intending to deceive, his legal representative is entitled to recover the amount stipulated in the policy, as against the defendant or defendants with whom he was so free from fault, with interest at seven per cent. from the date of

proofs of loss and costs of such action. If, on the other hand, one or both of the defendants has introduced evidence which preponderates to show that John A. Salgue sought to secure insurance with such defendant or defendants dishonestly, knowing or having reason to believe that he was seriously or materially afflicted as charged, or made other fraudulent mis-representations or material concealments, and with such knowledge, did not communicate it to the defendant or defendants, but fraudulently withheld it, the plaintiff would not be entitled to recover, and as to the defendant or defendants to whom such facts may be found to be applicable, you should find for one or both as the case may be, with costs of suit.

You should bear in mind throughout this case that the burden of proof is on the Insurance Companies to demonstrate to your moral and reasonable satisfaction the existence of such conduct on the part of Salgue as should under the rules I have given you defeat the policy or policies which were issued to him. They charge gross fraud upon his part. They charge an attempt to obtain over insurance, and they seek to ascribe this to Salgue, because they contend he knew the precarious tenure he had on life. Stripped from the technical verbiage of the pleadings, this is the substance of their defense. This is charging upon him a degree of moral turpitude which the jury should not find to have existed, unless they have sustained the burden of proof by such preponderance of evidence as would produce on the minds of the jury a moral and reasonable conviction that these charges are true. The jury then after considering all the evidence should carefully inquire whether there is to be gathered from it a purpose on the part of Salgue to accumulate insurance to gross fraud upon the insurance companies, or whether he acted with common honesty and good faith.

The Court might sum up in detail the evidence as we have the right to in courts of the United States, but the case has been so protracted and you must be so weary that I will not attempt to do this, but will call your attention to certain general considerations or inquiries you should make. You must find all the facts for yourselves and make such conclusions from those facts as under the law you may find the justice of the case and the rules of law demand. What I have said and what I shall say will be to assist and not to control your determinations. First, did Salgue's conduct show any anxiety or solicitude on his part to obtain this insurance, or on the other hand was it largely brought about by the anxious and reiterated solicitations of the defendant's local agents. On this subject you will recall the evidence. I repeat that you must find the facts for yourselves. What I say is not to control, but merely to aid you. But I will ask you to consider if there is any material difference between the witnesses for the plaintiff and for the defendant as to the eagerness and insistency of the insurance agents, including the agent for the Prudential, Mr. Adams, and the agents for the Aetna, Mr. Hawkins and Mr. Ray, to consummate as early and as certainly as possible the insurance of the life of this man. If he was hesitant, if he attempted to delay action, if he required that the policies should be

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produced and submitted to him, in order that he might contrast their relative benefits, if he disclosed to these agents or to either of them the difficulties he would have in paying for the insurance; if, in short, his actions were brought about not by facts which indicated a sinister and fraudulent purpose on his part to obtain insurance with the view of speedily securing unwarrantable gain for his family, and of inflicting unmerited and unlawful losses upon the companies, or either of them, if you find that all of this is true, you may, if you think proper, regard this evidence as portraying the natural and obvious behavior of an honest man, who while he desired insurance, was in no haste to obtain it by fraudulent methods rather than as evidence of gross fraud, which he had meditated against the companies, or either of them, and now seeking to carry into effect.

222 These, however, are matters entirely for your determination, and you must consider all the evidence in the case to the contrary, for the plaintiff and that upon which the defendants also rely, and you must conclude for yourselves whether they illustrate the normal and upright conduct of an honest man, or whether misrepresentation and fraudulent conduct as would vitiate the policies, which is charged by the defendants, accomplished by such degree of misrepresentation and fraudulently conduct as would vitiate the policies. In this contention, I charge you that an important consideration is the general character of the man for uprightness and probity.

On this subject, there is no dispute. The proof is conclusive that he was a man of good character. Indeed, the enthusiasm with which those who knew him spoke of his irreproachable character was [illegible] worthy. Now, it is true that sometimes men of good character commit offences marked by moral turpitude. They are sometimes guilty of fraud, sometimes of crime. But good character is ever a fact of great significance, especially in those cases which involve the presence or absence of guilt or purpose. Good character in the main is consistent with innocent and upright intentions and purposes, and happily not always so. It may make that clear which seems otherwise doubtful. It may make that doubtful which seems otherwise clear, and while it is not controlling, it is always a fact to which the jury should accord the greatest consideration and in each case such weight as clear-sighted and upright men should give it. Important at all times, certainly it is not least important when the mouth of the principal actor has been closed by death.

An important consideration in the case is, did Salgue truly know, and with such knowledge did he fraudulently conceal the fact that he had a mitral regurgitant murmur of the heart. In other words, does the evidence preponderate to show that he had knowledge that he had heart disease. You have heard what I have said with regard to the Aetna Life Insurance Company on this topic. As it relates to the Prudential Insurance Company of America, it is perhaps proper that I should say more. As I recall the evidence, Salgue was first examined by Dr. Little for the Penn Mutual Company. Dr. Little told him he had heart trouble and to go and consult his family physician. He then went to Dr. McAfee and imparted what Dr. Little

had said. Dr. McAfee agreed with Dr. Little. Mr. E. H. Holland, the agent for the Sun Life Company, testified that on a date which was shortly after Dr. Little's examination of Mr. Salgue, an
223 application for insurance in his company was secured on Salgue's life by a Mr. Nowell. The Medical Examiner of this company was Dr. Barron. His testimony is unequivocal. He states that he carefully examined Salgue, and found no indications of heart trouble whatever. He testified: "I examined Mr. Salgue for the Sun Life on the 29th of June, and for the Provident Savings on July 1st, 1905. I stripped Mr. Salgue to his flesh, and made a thorough examination, and found nothing detrimental to his receiving insurance and recommended him. I did not find any disease of [illegible]. I did not find any mitral murmur or displacement of the apex of the heart or abnormal enlargement of the heart. I did not discover either of these symptoms." On these examinations, both for the Sun Life and the Provident Savings the insurance examiner approved his application. This was about a week before the applications to the defendants. The policies were issued, but it appeared that Mr. Salgue held the Sun Life policy for some months before accepting it, and the policies for a considerable amount, which you will recall, issued upon this examination for the Provident Savings Life, Mr. Salgue rejected altogether. On July 6th, after these examinations by Dr. Barron who it appears from the evidence had large experience in such work, Mr. Salgue, after a somewhat persuasive and persistent interview with Mr. Charles M. Adams, the General Agent of the Prudential Company, went to Dr. Winchester, the local Examiner for that Company and for many other companies. This physician testified that he made a thorough examination and found no heart trouble whatever. He, however, said that a mitral murmur might be evident at some times and not at others. Dr. McAfee agreed with Dr. Little, and so did Dr. Ross, but Dr. Dowling, who treated Salgue in his last sickness, wholly repudiates the contention that he died from mitral murmur, or that he had a diseased heart, and gave as the diagnosis of the cause of his death, an aneurism, resulting from sudden and great exertion on his part in lifting a barrel of iron castings. Dr. Harrold after a careful examination, and immediately after Mr. Salgue had exerted himself in lifting a box filled with watermelons, determined that there was no evidence of heart trouble which could be developed by the stethoscope, or by other approved methods of examination, and passed him, as we have seen, as a good risk for insurance with the Aetna Company. You should also bear in mind on the subject the evidence of Dr. McHatton. He testified that he examined John A. Salgue for insurance for the Volunteer State Life of Chatta-
224 nooga, in July, 1905. This examination was after the Prudential and Aetna applications were concluded, if I mistake not. He testified: "I discovered an enlarged heart with mitral murmur. That is what I stated, 'the applicant has a mitral murmur, first sound not strong, apex about an inch below the normal line and displaced to the left.'" He further testified that he saw Mr. Salgue "on the 13th of July, 1905; saw him on the 2nd day of

March, 1906, the 3rd, the 20th, the 30th; April 13th and 15th, 1906." "When I saw him," said the Doctor, "the last series of visits that I made him, his condition was exactly what you would have expected, taking into consideration his condition at the time of the examination." That was "the progressive course, the continuation of the original organic disease." The manner of his death "would be one of the natural terminations of his type of condition. I just went on and treated him for his increased heart weakness." He did not advise Salgue's employers before the insurance was taken. "I saw one of his employers sometime after the insurance I cannot state how long afterwards, and told him so far as his usefulness was concerned, the man's days were over. I think it was a considerable time" after the examination. "It may have been after March, 1906."

On cross-examination Dr. McHatton testified: On July 13th, he did not require any treatment. "On July 13th, his cardiac condition was not bothering him, and he had no reason to know it existed from his own feelings, and when I heard his heart performing its duty, we do not give any medicine because nature is taking care of it." On July 13th, "there was no reason why he should know anything about it." Dr. McHatton said he "did not tell Salgue anything about it." He was an unusually robust looking man; I did not see," said the Doctor, "why it should give him any trouble at all." On July 13th, 1905, "I should not have treated him at the time" with digitalis or strophanthus. I never saw him professionally between July 13, 1905, and March 2, 1906, at that time his heart was giving him trouble—in March, 1906." At that time or in July 1905, there was no trouble with his health other than the heart trouble, so far as he could discover. The heart changes could only be discovered by an examination. It was not a thing the patient would know. Any doctor who would examine with sufficient care "should have discovered it; that part of it was not changeable; the murmurs are changeable, but the displacement and enlargement are not changeable." Any doctor "ought to have found the displacement
225 of the apex." I think the Doctor also said that not to have found it was inexcusable. You will remember.

On re-direct examination he testified "that during that period he could have been examined and not had the murmur, but the other part was permanent. The murmur sometimes disappears and returns, that was the least part of it, the enlargement of the heart was more important than the murmur."

Asked as to when he examined Mr. Salgue for the Volunteer Life and rejected him, if he told him the condition of his heart, the witness said: "No, sir; I did not tell him anything." He added that he did not tell Salgue he had rejected him. "Sometimes we reject or do not recommend a man and the Medical Examiner does not see fit to take the recommendation, so we never know until a policy returns whether it is accepted or not."

I think it is proper also to call your attention especially to the testimony of Dr. C. C. Harrold. He was Medical Examiner for the Aetna Company in 1905; was telephoned for, and went out to the

Bibb Brick Company and examined Salgue. The first part of the examination was in the front office, and the physicial examination in the room in the back. I asked Salgue those questions and wrote down his answers.

I asked him if he had heart disease. He said he thought he did not; there was a discussion after I asked that question and then I wrote the answer "No." I asked him closely as to any symptoms of heart disease and he said he had none of them, and that he had never been treated for heart trouble, so I then put down that answer "No" and went into the physical examination later on. He told me that either Dr. Winchester, or Dr. Little told him he had heart disease and it scared him so that he went to the other one and they told him he did not have heart disease nor any sign of it, those were the two names he mentioned. My recollection is he referred to Dr. Ross as having treated him for some slight trouble several years previously, from which he had completely recovered. "I examined him first with my stethoscope, listening to the action of the heart. The light was not very good in the room and I carried him over to the window, and I remember there was a box by the window so we could not get close to it, and he moved the box to the other side of the room so that I could get near the window and I examined him there with plenty of light as carefully as I could. I found nothing wrong with his heart. I did not find any murmurs, did not find it was displaced, did not find his pulse was too rapid.
226 found nothing wrong with his heart." He further testified "if this condition existed, he should have found them." That was his language.

On cross examination, he said: "I don't think he said any doctor told him he had heart disease, trouble with his heart is my recollection. If there had been a mitral murmur there I should have recognized it. If the heart had been displaced I should have recognized that. A man may have weakened heart muscles without showing it in his general appearance."

"The box that he moved from in front of the window had watermelons in it, is my recollection. I offered to help him move it and he said, no, he could move it. It was about the average size box we see around country homes with wood in them. I remember he moved it very easily. Sudden exertion would have increased the rapidity of the heart's action and would increase the distinctiveness of the mitral murmur, if there was such a murmur. I applied the stethoscope immediately."

You should consider also the evidence of his employers, Messrs. Moore and Massee, the continued and strenuous character of his work as superintendent of the brick yard, his labors in the clay pit when more than once there was a flood in the river, the laborious hours of work which he daily endured, the night work which at times was superadded, his remarkable physical vigor, and his apparent robust health. These gentlemen both testified that in the four years of service with them he lost but two days. His closest neighbor, Mr. Reeves, an intimate friend, testified that he had but one little sickness; and his widow, with whom as a wife he lived

during the entire period, testified not only to his uniform good health—except as to the malarial attacks possibly ascribable, in view of the testimony of a physician who attended him and his employers, to the low swampy land in which his labors were done, also to his fine appetite, and the ease with which he slept.

Does this evidence, then, preponderate to show that this man had the organic disease of the heart claimed? There is the testimony of Dr. Little, Dr. McHatton, Dr. Ross, and Dr. McAfee that he had it. There is the testimony of Doctors Harrold, Barron, Gostin, the testimony of his employers and the testimony of his wife, all of which you should consider in so far as it tends to show that he did not. Does it preponderate to show that he had the organic disease of the heart claimed, and if it does, does it preponderate to show that he knew it, or believed it, and so knowing or believing fraudulently concealed it from the defendant companies? We have
227 seen that he did not at least wholly conceal it from the Aetna. Did he wilfully and fraudulently conceal it from the Prudential, whose physician examined him, and could find no trace of it.

In determining this question we must necessarily leave all personal considerations and personal attachments to physicians out of the question. None of these witnesses are impeached. They are all supposed to have spoken the truth, as they understood it. If they do differ, their differences may be regarded, if you think proper from the evidence, as the failure of high mentalities, scientifically trained, to concur upon the presence or absence of an affliction which may in some sense be regarded as latent or occult and wholly discoverable by a scientific examiner. It is for you to say, gentlemen, whether all of this evidence preponderates to produce in your minds the conviction that Salgue knew that he had heart disease, and that he fraudulently concealed that knowledge from the defendant, Prudential Company.

It is, however, insisted that Salgue was guilty of fraud which should vitiate the policies because he withheld the fact that he had been rejected by the Penn Mutual, and it is insisted by defendant's counsel that the facts show a rejection to be determined by the court as a matter of law. The court has not been able to agree with this contention, and leaves the question to the jury, it being a mixed question of law and fact. It does not appear, so far as I recall the evidence, that the Penn Mutual ever definitely informed Salgue that his application was rejected, although Dr. Little informed him that he could not recommend him. Dr. McHatton, you will recall, testified that sometimes companies did not heed the recommendations of the local examiner. But the application, as I recall the evidence, was never sent to the home company at all. Dr. Little gave it to Anderson Clark, the local agent of that company, and Anderson Clark himself testified that he told Salgue if he would pay Little's fee he would not send the application to the company and that it would not be regarded as a rejection. The fee was paid, and if you believe from the evidence that Salgue in good faith accepted the statement of Anderson Clark as true, and that when he said he had not been rejected he in good faith acted upon the information thus imparted to him by the Company's agent, you would not be justified

on this ground, so far as that company is concerned, in holding that fraud should be imputed to him because he said he had not been rejected for insurance. The question depends upon his integrity of purpose, and the presence or absence of good faith on his
228 part, and that is entirely a question for your consideration.

Much has been said about chronic acid gastritis, for which Dr. McAfee testified that he had treated Salgue for a number of months, but much more was said, however, on this subject by counsel for the plaintiff than by counsel for the defendants. It is contended that this malady, if it existed, was the cause of the death of the insured. It does not appear to have affected his activity, his sleep, his physical vigor, or general usefulness; and Dr. McAfee introduced as a witness for the defendant, who was himself an insurance examiner, testified that it would not have been a cause for rejecting him as an applicant for insurance, but merely a cause for postponement. We gather from the testimony of Dr. McAfee, if I remember it, but you must recall it for yourselves, that his last treatment of Salgue was on the 13th day of July, 1905, for chronic acid gastritis, in the course of which he used a siphon, the use of which so enkindled the ire and prompted the animadversions of one of the plaintiff's learned counsel. We find nothing further in the evidence with reference to this malady and Salgue did not die until May 27, of the following year. May it not be, then, that notwithstanding the derogatory remarks of counsel concerning this treatment that it had the desired effect, and Salgue was cured by Dr. McAfee many months before his death, that is, cured of gastritis. This may be considered by you, with all of the other evidence, upon the question of the materiality and good faith of Salgue's answers. If this is true, it may serve to confirm the well known lines of Homer

"A wise physician, skilled, our woes to heal.
Is more than armies to the common weal."

Gentlemen, you should strive to attain simple justice in this case and you can only do so by confining your attention to the evidence and the law as given you in charge in this case. You are not trying a cause of pathetic incidents on one side and a corporation on the other. In this case you must write separate verdicts. If you should find for the plaintiff against the Prudential Insurance Company of America, your verdict would read, in the action of the plaintiff against the defendant, Prudential Insurance Company of America, "We, the jury find for the plaintiff the sum of five thousand dollars, with interest at 7% from July 27th, 1906, with costs of suit."
229 Should you find for the defendant, Prudential Insurance Company of America, that they are not due to the plaintiff the amount of their policy, since they admit that they are indebted in the sum of $210.00, the amount of the premium paid by Salgue, and since they have tendered that amount your verdict should read, in the action of the plaintiff against the defendant, Prudential Insurance Company of America, "We, the jury find for the plaintiff the sum of $210.00, with interest at 7% from July 29th, 1905, to

the 30th day of September, 1907, without costs."—that being the date of the tender back of the premiums.

Should you find for the plaintiff against the defendant, Aetna Life Insurance Company, your verdict should read, in the action of the plaintiff against Aetna Insurance Company, "We the jury find for the plaintiff the sum of six thousand dollars with interest at 7% from July 27, 1905, with costs of suit."

Since the Aetna has made no tender of premiums, if you find against the plaintiff and for the Aetna, your verdict should read, "We the jury find for the defendant, Aetna Life Insurance Company."

Your verdict will be written on the declarations respectively as to the Insurance Companies.

Exceptions to Charge.

Mr. BLACK: If your Honor please, I handed your Honor some requests to charge. I want to call the Court's attention to one of them. This is the request that I shall ask the Court to make (reading):

"The defendant, the Prudential Insurance Company of America, requests the Court to charge as follows: Question 14B of the application of said John A. Salgue to the said Prudential Insurance Company is as follows: 'Has any company or association ever declined to grant insurance on your life or issued a policy of a different kind, or for a sum less than that applied for? (Answer 'Yes' or 'No.')' The answer to this question is "No." The defendant insists that this answer is false, and says that the said Salgue in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was
230 declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent of the Penn Mutual Life Insurance Company for insurance, and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark as agent of the Penn Mutual Insurance Company, to Dr. Little, examiner for the said Penn Mutual Insurance Company, for examination, and that Dr. Little as said examiner examined the said Salgue and stated to the said Salgue that he had heart trouble, and that for this reason he could not pass him; then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue; and if you believe from the evidence that such application was made and such declination was made, then I charge you that the answer of Salgue to this question was false, and that it was warranted to be true and that it was as to material matter, which would tend to change the nature, extent or character of the risk assumed, and that in this event the plaintiff could not recover."

Your orator charged differently from that and I simply desired to call the Court's attention to that at this time.

The COURT: Will you be good enough to read the memorandum I have made to your requests?

Mr. BLACK: This is my memorandum.

The COURT (reading memorandum made by the Court): "In so far as these requests to charge are deemed correct, the Court had preferred to announce the principles involved in language other than that adopted by the learned counsel for the defense." (Top of requests to charge of the Prudential Insurance Company.)

Mr. BLACK: If your Honor please, I think that applies to all save one request, to which I have called your Honor's attention. I think on this request, it is a matter of law, and the Court and I have differed about it, and that is the reason I call it especially to your attention.

231 The COURT: I have given very close attention to it when you called my attention to it, and that is the entry I have made.

Mr. BLACK: I desire only as to that one charge to note an exception.

Judge MILLER: May it please your Honor, I desire to note an exception, first, may it please your Honor, I understand from that 111th case—I have to remember those requests—if the Court will notice, the Court not giving in charge to the jury the 1st and 2nd requests to charge the two propositions taken from or contained in the 120th Georgia; also the 3rd, may it please your Honor, which is a reference to Salgue's answer to the Aetna application 'No,' when asked if he had heart disease; also the Court's refusal to charge the 4th, which was the answer to the question, asking the names of all the physicians. Also, may it please the Court, the 5th, which contained the question, 'Has any proposal or application to insure your life been made to any company, association or agent, on which a policy of insurance is now pending, or has any such proposal or application ever been made for which insurance has not been granted or'

Also, the 6th, may it please your Honor. It deals with this particular and very brief question—'Has any physician expressed an unfavorable opinion upon your life with reference to life insurance, and if so state particulars.'

I strike the 7th, may it please the Court, on the gastritis question. That involves the dyspepsia question in the application upon which the Court has charged fully, and twice in the course of the charge, taking it from two different points of view, which are entirely satisfactory to us.

I also except to the failure to read the 8th, may it please the Court, the proposition that, if the previous charges had been given as requested, the jury would be controlled in finding their verdict by them, notwithstanding they might believe from the evidence that Salgue died from thoracic aneurism and not from heart disease; and that your Honor has not charged.

The COURT: Do you desire exceptions noted to all of those failures to charge of the Court?

Judge MILLER: Yes sir.

232 The COURT (to the stenographer) Make this memorandum.

Judge MILLER: With the Court's permission now, I will number these last. They are not numbered. The other is Number 7, the last were not numbered. They will be 9, 10 and 11 and the 12th. To avoid reading these, I will simply state that these 4 grounds, 9, 10, 11 and 12, all have reference to the effect of the notice to the agents of the company and were prepared by Mr. Hall.

May it please your Honor, I ask to note an exception to that portion of the Court's charge in reference to the willful concealment. The exception taken there, may it please your Honor, is this, that while the Court gave the last request, I handed up merely in the words of the request, the word "fraudulent" was added. I believe to the word "willful," either "fraudulent and willful" or "fraudulent or willful." I don't know how the context is there. I took it from the statute, which merely says, "the willful concealment of such a fact." I note an exception to the fact that the Court added the word "fraudulent," and did not give the request in the language asked for.

I beg to note an exception further to the same conjunction of words. Your Honor was instructing the jury as to the effect of the mis-representation of facts, which was charged there as a willful and fraudulent mis-representation or concealment. I cannot recall the exact portion of the charge of course.

I beg to further note an exception to what I think was an oversight on the part of the Court as to the evidence of Hawkins. In charging the jury that after Hawkins and Ray had been told by Salgue that he had heart trouble, and Harrold had also been told the same thing, and came out and made his statement that he found no trouble, and would stake his professional reputation that he had no heart trouble, Hawkins then said, that is a matter for our physicians with which we are not concerned and proceeded to make out the policy.

The COURT: I think I said that.

Judge MILLER: You did say that—that is the trouble. What I am asking an exception to be noted for is, that when Hawkins made that statement to Salgue, Harrell had not come. He

233 was sent for, for that purpose.

The COURT: I will tell the jury to correct me in that, if I am wrong—they will remember the evidence.

Judge MILLER: That is entirely satisfactory.

One further exception, may it please your Honor, that is the instruction to the jury that if they believe from the evidence that Salgue had told Ray, Hawkins and Harrold about being previously informed that he had heart trouble by other physicians, the jury would find from that—and after, I will add—and afterwards, with that knowledge and Harrold's own statement to Salgue, they then wrote the application, the jury would have the right to conclude that Salgue had no fraudulent intent, but on the contrary the fraud, if any, would be upon the agents representing the Aetna Company.

That is as near as I can recall it. That is the idea I gathered from the charge.

The COURT. Of course, your exception relates to that portion of the charge, and will be compared with the literal expressions used.

Judge MILLER. One more, may it please your honor, and that is as to the Court's instruction to the jury as to the information from the failure of Salgne as to the cause of his rejection by the Penn Mutual, as to whether he was informed by any one connected with that transaction that he had heart trouble, the Court stating to the jury being that it nowhwere satisfactorily appeared in the evidence. I am just giving my recollection of it—that subject is cited from anybody that Little had rejected him on account of heart trouble. My recollection is that Clark testified, Anderson Clark, and said it was in a letter, and we served notice for that letter, and Clark gave the substance of it, the plaintiffs responding that they had no such letter—the letter containing the statement that he could not pass him, that he was rejected, that he would withhold the application for the policy so that he would not be classed as being rejected, and that Dr. Little had refused to recommend him favorably.

The COURT. I say as to that like I say about the other portions of the charge, that my statement was merely as to my recollection of the facts to assist the jury, and if I am wrong you will not take those statements and act upon them. I do not mean for my statement to control, you must find the facts for yourselves.

Judge MILLER. That is all right.

The COURT. Hand the papers to the jury. (After the jury had retired—addressing counsel.) (Upon a request from the jury.) Gentlemen, the conclusion of the charge was merely an instruction how to write the verdict. The jury say they would like to have that to know how to write their verdict. I can just tear off the last page.

(Counsel expressed assent.)

Mr. BLACK. No objection to that.

Conclusion.

After the argument of counsel and the charge of the Court to the jury, the jury retired and afterwards on the 21st day of May, 1909 returned into court with a verdict in favor of the plaintiff against the defendant, The Prudential Insurance Company of America, for $5,000.00, principal, and interest from July 27th, 1909, and costs of suit, and on the 1st day of June, 1909, judgment in favor of the plaintiff was duly entered on said verdict for the principal sum and interest as found in said verdict against the defendant, The Prudential Insurance Company of America, with costs of suit.

By order of the Court passed at the May Term, 1909, of said Court, it was provided that it being represented to the Court that it was the intention of the defendant to prosecute a writ if error to the Circuit Court of Appeals for the Fifth Judicial Circuit, the defendant, The Prudential Insurance Company of America, have until the 1st day of September, 1909, in which to present and have

235 allowed, settled and certified its bill of exceptions in this cause and that execution be stayed until such time.

By further order of the Court passed at the May Term, 1909 of said Court, it was provided that it being represented to the Court that it was the intention of the defendant, The Prudential Insurance Company of America, to prosecute a writ of error to the Circuit Court of Appeals for the Fifth Judicial Circuit, that the defendant, The Prudential Insurance Company of America, have until October 1st, 1909, in which to present and have allowed, settled and certified its bill or bills of exception in this cause, and that execution be stayed until such time.

Said May Term, 1909, of the Court is still in session at the time of the presentation, settlement and certifying hereof.

And now in furtherance of justice and that right may be done, the defendant, The Prudential Insurance Company of America presents the foregoing as its bill of exceptions in this case and prays that the same may be settled, allowed, signed and certified as provided by law.

McDANIEL, ALSTON AND BLACK,
Attorneys for the Defendant, The Prudential Insurance Company of America.
E. R. BLACK,
SANDERS McDANIEL,
R. C. ALSTON,
Of Counsel.

We hereby agree that the foregoing bill of exceptions contains a full, true and complete brief of the evidence introduced in this cause, and consent that the evidence as briefed may be used in this bill of exceptions, and further agree that the bill of exceptions contains true copies of all documentary evidence introduced in said cause.

This September 25, 1909.

OLIN J. WIMBERLY,
MINTER WIMBERLY,
JESSE HARRIS,
Attorneys for Plaintiff.
E. R. BLACK,
McDANIEL, ALSTON & BLACK,
Attys. for Defendant, The Prudential Insurance Co. of America.

236

[*Order.*]

In the Circuit Court of the United States for the Western Division of Southern District of Georgia.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Action on Insurance Policy.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

Action on Insurance Policy.

Consolidated for Trial.

The foregoing bill of exceptions is correct in all respects and is hereby signed, approved, allowed and settled *signed* and made a part of the record herein.

Dated this 27th day of September, 1909, a day of the — term of said Court and done in open Court.

EMORY SPEER,
U. S. Judge.

Ent. J—68.

Filed Sept. 29, 1909. Cecil Morgan, Deputy Clerk.

Indorsed: No. 16. In Circuit Court U. S., Sou. Dist. of Ga. Moore, Adm'r vs. The Prudential Ins. Co. Bill of Exceptions. Filed Sept. 29, 1909. Cecil Morgan, Deputy Clerk. McDaniel, Alston & Black, Attys.

237

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of Georgia, ss.

I, Tomlinson F. Johnson, clerk of the Circuit Court of the United States for the Southern District of Georgia, at Macon, do hereby certify that the foregoing three hundred and twenty-nine (329) pages contain a true and correct copy of the record, bill of exceptions, assignment of errors and all other proceedings in the case lately pending in said Court, numbered 391, on the law docket of said Court, entitled John T. Moore, administrator of the estate of John Andrew Salgue, deceased, versus The Prudential Insurance Company of America, and consolidated for trial with the case of John T. Moore, administrator of the estate of John Andrew Salgue, deceased

allowed, settled and certified its bill of exceptions in this
235 cause and that execution be stayed until such time.

By further order of the Court passed at the May Term, 1909 of said Court, it was provided that it being represented to the Court that it was the intention of the defendant, The Prudential Insurance Company of America, to prosecute a writ of error to the Circuit Court of Appeals for the Fifth Judicial Circuit, that the defendant, The Prudential Insurance Company of America, have until October 1st, 1909, in which to present and have allowed, settled and certified its bill or bills of exception in this cause, and that execution be stayed until such time.

Said May Term, 1909, of the Court is still in session at the time of the presentation, settlement and certifying hereof.

And now in furtherance of justice and that right may be done the defendant, The Prudential Insurance Company of America presents the foregoing as its bill of exceptions in this case and prays that the same may be settled, allowed, signed and certified as provided by law.

McDANIEL, ALSTON AND BLACK,
Attorneys for the Defendant, The Prudential Insurance Company of America.
E. R. BLACK,
SANDERS McDANIEL,
R. C. ALSTON,
Of Counsel.

We hereby agree that the foregoing bill of exceptions contains a full, true and complete brief of the evidence introduced in this cause, and consent that the evidence as brieted may be used in this bill of exceptions, and further agree that the bill of exceptions contains true copies of all documentary evidence introduced in said cause.

This September 25, 1909.

OLIN J. WIMBERLY,
HUNTER WIMBERLY,
JESSE HARRIS,
Attorneys for Plaintiff.
E. R. BLACK,
McDANIEL, ALSTON & BLACK,
Attys. for Defendant, The Prudential Insurance Co. of America.

236

[*Order.*]

In the Circuit Court of the United States for the Western Division of Southern District of Georgia.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Action on Insurance Policy.

JOHN T. MOORE, Administrator of John A. Salgue,
vs.
AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

Action on Insurance Policy.

Consolidated for Trial.

The foregoing bill of exceptions is correct in all respects and is hereby signed, approved, allowed and settled *signed* and made a part of the record herein.

Dated this 27th day of September, 1909, a day of the — term of said Court and done in open Court.

EMORY SPEER,
U. S. Judge.

Ent. J—68.

Filed Sept. 29, 1909. Cecil Morgan, Deputy Clerk.

Indorsed: No. 16. In Circuit Court U. S., Sou. Dist. of Ga. Moore, Admr vs. The Prudential Ins. Co. Bill of Exceptions. Filed Sept. 29, 1909. Cecil Morgan, Deputy Clerk. McDaniel, Alston & Black, Attys.

237

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of Georgia, ss.

I, Tomlinson F. Johnson, clerk of the Circuit Court of the United States for the Southern District of Georgia, at Macon, do hereby certify that the foregoing three hundred and twenty-nine (329) pages contain a true and correct copy of the record, bill of exceptions, assignment of errors and all other proceedings in the case lately pending in said Court, numbered 391, on the law docket of said Court, entitled John T. Moore, administrator of the estate of John Andrew Salgue, deceased, versus The Prudential Insurance Company of America, and consolidated for trial with the case of John T. Moore, administrator of the estate of John Andrew Salgue, deceased

versus The Aetna Life Insurance Company of Hartford, Conne
cut, as the same now appear of record in my office.

In witness whereof, I have hereunto set my hand and affixed
seal of said Court, at Macon, in said district, on the 25th day of
tober, A. D. 1909.

[SEAL.]

TOMLINSON F. JOHNSON,
Clerk U. S. Circuit Court for the
Southern District of Georgia.
By LENOIR M. ERWIN, *Deputy Clerk.*

238 Pleas and proceedings had and done at a regular term of t
United States Circuit Court of Appeals for the Fifth Circu
begun on the first Monday in October, A. D. 1910, at Atlant
Georgia, and on the third Monday in November A. D. 1910,
New Orleans, Louisiana, before the Honorable Don A. Pardee a
the Honorable David D. Shelby, Circuit Judges, and the Hono
able Harry T. Toulmin, District Judge.

Be it remembered that heretofore to-wit: on the 15th day
November, A. D. 1909, a transcript of record, pursuant to a wri
of error — the Circuit Court of the United States for the Southern
District of Georgia, was filed in the office of the clerk of the Unite
States Circuit Court of Appeals for the Fifth Circuit, wherein Th
Prudential Insurance Company is plaintiff in error, and John T
Moore, Administrator, is defendant in error, which said transcript o
record was filed and docketed in said Circuit Court of Appeals a
No. 2034.

That thereafter the following proceedings were had in said cause
in said Circuit Court of Appeals, viz

239

Argument and Submission.

OCTOBER 5, 1910

No. 2034.

PRUDENTIAL INSURANCE COMPANY
vs.
JOHN T. MOORE, Admr.

On this day this cause was regularly called, and after argument
by E. R. Black, Esq., for plaintiff in error, and Minter Wimberly,
Esq., and Alex. Akerman, Esq., for defendant in error, was submitted
to the court.

And thereafter on March 28, 1911, an opinion of said Circuit Court
of Appeals was filed in said cause in words and figures following
to-wit:

Opinion.

U. S. Circuit Court of Appeals. Filed Mar. 28, 1911. Charles H. Ledmum, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2034.

PRUDENTIAL INSURANCE COMPANY
v.
JOHN T. MOORE, Administrator.

Error to the Circuit Court of the United States, Southern District of Georgia.

Before Pardee and Shelby, Circuit Judges, and Toulmin, District Judge.

By the COURT:

240 None of the assignments of error are well taken. The judgment of the Circuit Court is affirmed.

Pardee, Circuit Judge, does not concur.

And on the twenty-eighth day of March, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause in the words and figures following, to-wit:

Judgment.

No. 2034.

THE PRUDENTIAL INSURANCE COMPANY
vs.
JOHN T. MOORE, Admr.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Georgia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Prudential Insurance Company, and the surety on the writ of error bond herein, American Surety Company of New York, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

Mch. 28, 1911.

241 I, Charles H. Ledmum, Clerk of the United States Circuit Court of Appeals for the Fifth District, do hereby certify that the 2 pages next preceding this certificate contain full, true and com-

plete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States for the Southern District of Georgia) in a certain cause in said court, numbered 2034, wherein The Prudential Insurance Company, is Plaintiff in Error, and John T. Moore, Administrator, is Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of June A. D. 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]
[SEAL.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

212 In the Supreme Court of the United States, October Term, 1911

No. 670

PRUDENTIAL INSURANCE COMPANY
vs.
JOHN T. MOORE, Admr. of John A. Salgue, Deceased.

In this cause now pending in the Supreme Court of the United States, it is agreed by and between the parties to said cause that the certified transcript of the record in this cause on file in the Supreme Court of the United States may be taken as a return to the writ of the Supreme Court of the United States in this cause, dated October 26th, 1911, and directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, commanding that the record and proceedings in said cause should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States.

This November 9th, 1911.

SANDERS McDANIEL,
EUGENE R. BLACK,
EDWARD D. DUFFIELD,
Attorneys for Prudential Insurance Co.
AKERMAN & AKERMAN,
MINTER WIMBERLY,
JESSE HARRIS,
Attorneys for John T. Moore, Admr. John A. Salgue Deceased.

The foregoing has the following indorsements to-wit:

No. 2034. The Prudential Insurance Co. vs. John T. Moore, Admr. Stipulation.

U. S. Circuit Court of Appeals. Filed Nov. 18, 1911. Frank H. Mortimer, Clerk.

McDaniel & Black, Attorneys at Law, Atlanta, Ga.

243 United States Circuit Court of Appeals for the Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 1 page, numbered *from — to —, inclusive*, contains a true copy of the stipulation in the case of The Prudential Insurance Co., versus John T. Moore, Admr., No. 2034, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 20th day of November, A. D. 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

244 UNITED STATES OF AMERICA, *ss.*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Prudential Insurance Company of America is plaintiff in error, and John T. Moore, as Administrator of John A. Salgue, deceased, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
245 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

246 [Endorsed:] File No. 22,746. Supreme Court of the United States. No. 670, October Term, 1911. The Prudential Insurance Company of America vs. John T. Moore, Administrator, etc. Writ of Certiorari. U. S. Circuit Court of Appeals. Filed Nov. 18, 1911. Frank H. Mortimer, Clerk.

15

Office Supreme Court
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JAMES H. McK

IN THE

Supreme Court of the United States

No. 887.47

OCTOBER TERM 1911

THE PRUDENTIAL INSURANCE CO. OF AMERICA,
PETITIONER,

VS.

JOHN T. MOORE, Administrator of John A. Salgue,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

EDWARD D. DUFFIELD,
SANDERS McDANIEL,
EUGENE R. BLACK,
Counsel for Petitioner.

Appeal Pub. Co., Atlanta, Ga.

The Supreme Court of the United States

OCTOBER TERM, 1911.

No. 670.

The Prudential Insurance Company of America,
Petitioner,

VS.

JOHN T. MOORE, Administrator of John A. Salgue,
Deceased,
Respondent.

To the Honorable, the Supreme Court of the United States:

Your petitioner, the Prudential Insurance Company of America, a corporation duly authorized and existing under the laws of the State of New Jersey, and having its principal place of business in Newark, N. J., petitions this Honorable Court that its writ of certiorari may be granted, directing the United States Circuit Court of Appeals for the Fifth Judicial Circuit to certify to this Honorable Court, for its review and determination, the case of your petitioner, as plaintiff in error, versus John T. Moore, as Administrator of John A. Salgue, deceased, defendant in error, the said John T. Moore, Administrator, being a citizen and resident of the Western Division, Southern District of Georgia; and for reasons therefor, respectfully shows to this Honorable Court as follows:

STATEMENT OF THE CASE.

Early in June, 1905, John A. Salgue desired to obtain $5,000.00 of insurance on his life, and he applied on June

The Supreme Court of the United States

OCTOBER TERM, 1911.

No. 670.

The Prudential Insurance Company of America,
Petitioner,

VS.

JOHN T. MOORE, Administrator of John A. Salgue,
Deceased,
Respondent.

To the Honorable, the Supreme Court of the United States:

Your petitioner, the Prudential Insurance Company of America, a corporation duly authorized and existing under the laws of the State of New Jersey, and having its principal place of business in Newark, N. J., petitions this Honorable Court that its writ of certiorari may be granted, directing the United States Circuit Court of Appeals for the Fifth Judicial Circuit to certify to this Honorable Court, for its review and determination, the case of your petitioner, as plaintiff in error, versus John T. Moore, as Administrator of John A. Salgue, deceased, defendant in error, the said John T. Moore, Administrator, being a citizen and resident of the Western Division, Southern District of Georgia; and for reasons therefor, respectfully shows to this Honorable Court as follows:

STATEMENT OF THE CASE.

Early in June, 1905, John A. Salgue desired to obtain $5,000.00 of insurance on his life, and he applied on June

15th, 1905, to the local agent at Macon, Ga., of the Penn Mutual Life Insurance Company for a policy of $6,000.00. Salgue already had $4,000.00 of insurance, and decided to take $6,000.00 more of insurance, instead of $5,000.00 more, in order that he might have altogether $10,000.00 of insurance on his life. He signed a regular application to the Penn Mutual Life Insurance Company for this $6,000.00 of additional insurance. His application was obtained and witnessed by Anderson Clark, local agent at Macon, Ga., of the Penn Mutual Life Insurance Company. This application was delivered by Anderson Clark, Agent, to Dr. W. J. Little, the regularly appointed medical examiner at Macon, Ga., for the Penn Mutual Life Insurance Company. Salgue appeared before Dr. Little, the said medical examiner, and was examined by him as examiner of the Penn Mutual Life Insurance Company for this policy in this company. During the course of this examination, Dr. Little, the examiner, discovered that Salgue had a mitral murmur of the heart, and faulty regurgitation of the heart, what is known in medicine as a form of heart disease. Dr. Little, the examiner, as the result of this examination for this policy, notified Salgue, the applicant, and Anderson Clark, the agent, of the diseased condition of Salgue's heart, and told them both that on account of the existence of this condition, Salgue could not obtain this insurance. In this Penn Mutual Life Insurance Company, it was the rule that the examining physician should report to the local agent furnishing the application, the result of his examination, and if the medical examiner completed the examination, the examination blank was to be filled out by him and delivered to the local agent, by whom it was sent with the application to the company. In this examination of Salgue, when the presence of heart disease was discovered in the applicant, the medical examiner made no completed written examination, but informed the local agent, as he was required under the rules of this company to do, that he could not approve the risk, and he advised Salgue to go to his family physician for treatment for heart trouble.

Salgue then paid to the agent of the Penn Mutual Life Insurance Company $5.00 with which to pay for the medical examination made by Dr. Little, the medical examiner, and this sum was paid by the agent to Dr. Little. This procedure constituted in law a rejection by the Penn Mutual Life Insurance Company of Salgue for the insurance applied for by him.

Immediately after this rejection, and acting upon the advice of Dr. Little, Salgue went to his family physician, Dr. J. C. McAfee, and told him what Dr. Little had said, and asked him to examine his heart. This physician, Dr. McAfee, examined him, and discovered the same diseased condition of his heart, and informed Salgue of it.

With this information fresh in his mind as to the diseased condition of his heart, Salgue, within the next thirty (30) days, applied for $27,000.00 of insurance, although he had originally wanted but $5,000.00 of additional insurance. His applications for insurance were as follows: On June 13th, 1905, he applied to the Provident Savings Life Insurance Company of New York for $5,000.00 of insurance; on June 28th, 1905, he applied to the Sun Life Insurance Company of Canada for $6,000.00 of insurance; on July 6th, 1905, he applied to your petitioner for $5,000.00 of insurance; on July 8th, 1905, he applied to the Aetna Life Insurance Company for $6,000.00 of insurance; only July 13th, 1905, he applied to the Volunteer State Life Insurance Company for $5,000.00 of insurance. The diseased condition of his heart was not discovered by the examiners for the Sun Life Insurance Company, Provident Savings Life Insurance Company, the Prudential Life Insurance Company, your petitioner, and the Aetna Life Insurance Company, and policies were issued to him by those companies. The diseased condition of his heart was discovered by the medical examiner of the Volunteer State Life Insurance Company, and this company rejected his application for insurance because of this diseased condition.

In none of his answers to the questions in his applications to the Sun Life Insurance Company, the Provident Savings Life Insurance Company, the Prudential Insurance Company, your petitioner, and the Volunteer State Life Insurance Company, did he disclose the fact that he had heart disease, nor that he had been rejected for insurance by the Penn Mutual Life Insurance Company, although each of these companies asked him specifically as to those two facts. In his application to the Prudential Insurance Company, your petitioner, he was asked: "Has any company or association ever declined to grant insurance on your life, or issued you a policy of a different kind or for a sum less than that applied for? Answer yes or no." To this question he answered no. In his medical examination for the Prudential, he was asked: "Has your application for insurance ever been rejected, postponed or modified by an insurance company, assessment, social or benevolent order?" To this question he answered no. In his medical examination for the Prudential Insurance Company, your petitioner, he was asked the following question: "Are you in good health?" To which he answered yes.

The policy of the Prudential Insurance Company, your petitioner, was issued: "In consideration of the application for this policy, which is hereby made a part of this contract." In his application, he made the following warranty: "I hereby declare and warrant that I am in good health, and of sober and temperate habits, and that all the statements and answers to the above questions are complete and true, and that the foregoing, together with this declaration, shall constitute the application, and be a part of the contract for insurance hereby applied for, and it is agreed that the policy herein applied for shall be accepted subject to privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described

in the application. (The applicant will please read the answers written after each of the above questions before signing. Signature of person whose life is to be insured.) (Signed) John Andrew Salgue. Witness to signature (Signed) C. M. Adams." Dated at Macon, Ga., this 6th day of July, 1905.

In his medical examination he made the following warranty: "I hereby warrant that the answers to these questions are true, and agree that they shall form a part of the contract for insurance applied for. Dated this 6th day of July, 1905. (Signed) John A. Salgue, (applicant's signature.)"

Salgue took $17,000.00 of insurance issued from the following companies: The Prudential Insurance Company, your petitioner, $5,000.00; the Aetna Life Insurance Company, $6,000.00; the Sun Life Insurance Company, $6,000.00. Salgue was found dead on a train May 27th, 1906. The coroner held an inquest upon him, and the coroner's verdict found that he had died from heart disease. His policy was issued by the Prudential Life Insurance Company, your petitioner, on July 10th, 1905; he died within less than a year from the date of his application to your petitioner, and from the date of your petitioner's policy. John T. Moore was appointed his administrator. As administrator, he made demand on your petitioner for payment of its policy. Your petitioner declined payment on account of the fraud practiced upon it by Salgue in procuring the policy, to-wit: his fraud as contained in his answer to the question in the application as to any previous rejection by any other company, and his false warranty in the application as to the state of his health, and his false answer to the question in the application in reference to pending applications at that time for insurance in other companies, and his false answer to the question in the medical examination as to the condition of his health, and his false answer in the medical examination as to the last attendance upon him

by a physician, and his false warranty in his medical examination as to the condition of his health; all of which false answers were as to material matters, and were known to Salgue to be false, and were warranted by him to be true.

The Aetna Life Insurance Company, which had also issued a policy to Salgue, declined payment to John T. Moore, Administrator, on account of the fraud practiced upon that Company by Salgue in the procurement of its policy. Thereupon, on May 25th, 1906, the respondent, John T. Moore, as administrator of Salgue, brought separate suits in the Circuit Court of the United States, Western Division, Southern District of Georgia, on the common law side of said court, and to the October Term, 1907, thereof, against your petitioner, and against the Aetna Life Insurance Company, respectively, on the respective policies issued by the two said companies to said Salgue. These two suits were in the usual form. To the suit filed against your petitioner by said Moore, Administrator, your petitioner filed its plea, making in substance this defense: That the policy was a Georgia contract, that it was issued in consideration of the application which, by the warranty of Salgue, and by the terms of the policy itself, was made a part of the contract of insurance, that the medical examination, by the warranty of Salgue thereon, was made a part of the contract of insurance, that the statements and answers to the questions in the application were warrantied by Salgue to be complete and true, that the answers to the questions in the medical examination were warranted to be true, that the warranty in his application warrantied that he was in good health, and convenanted that the policy of your petitioner should not take effect until delivered to him while in good health, that he was not in good health, but was afflicted with heart disease, and that he made the false answers to the questions contained in the application relative to any previous rejections by any other company, and relative to the pendency of other

applications in other companies, and that he made false answers to the questions contained in the medical examination relative to the condition of his health, and relative to any prior rejection by any other company, and relative to the last attendance upon him by a physician; and that, having warrantied all these statements and answers to be true, and all of them being false, and all of them being matters material to the risk, and tending to vary the nature or extent or character of the risk assumed in the contract of insurance applied for and issued, such false answers and false warranties had voided the policy of insurance issued, and said policy of insurance had never gone into effect.

THE LITIGATION IN THE CIRCUIT COURT.

This suit by Moore, Administrator, against your petitioner was in order for trial at the May Term, 1909, of the said Circuit Court. Immediately below it on the trial calendar was the case of Moore, Administrator of Salgue, versus the Aetna Life Insurance Company; the same being a suit based upon the policy issued to Salgue by that company. When the case against your petitioner was called for trial, counsel for Moore, Administrator, moved the Circuit Court to consolidate for trial the case against your petitioner with the case of Moore, Administrator, versus the Aetna Life Insurance Company. To this motion your petitioner objected, and showed to the court that the suits were between different parties, involved different question of law and fact, were based upon different contracts, and that the defenses to the two suits, respectively, were essentially different. Over the objection of your petitioner, the court consolidated the trial of the two said causes under the following order:

"In the Circuit Court of the United States for the Western Division, Southern District of Georgia.

JOHN T. MOORE, Administrator of the Estate of John Andrew Salgue, Deceased.

VS.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA. At Law.

ACTION ON INSURANCE POLICY.

JOHN T. MOORE, Administrator of the Estate of John A. Salgue, Deceased.

VS.

THE AETNA LIFE INSURANCE COMPANY, OF HARTFORD, CONN. At Law.

ACTION ON INSURANCE POLICY.

"It appearing to the court that the above stated causes pending in this court are of a like nature, and relative to the same and similar questions, and involve issues similar in their character, and that it will avoid unnecessary cost and delay to try said cases together before the same jury, it is upon consideration thereof hereby ordered by the court that said causes be tried together before the same jury, and that the jury render separate verdicts.

"In open court, May 13th, 1909. (Signed) Emory Speer, Judge."

To this order, exception was duly taken by petitioner, and allowed by the court. This order and consolidation for trial was extremely hurtful to your petitioner. The two contracts of insurance were issued under entirely different conditions, upon different applications, and, as will be shown by the record, the defenses were entirely different. It was disclosed in the evidence that Salgue had stated to the medical examiner of the Aetna Life Insurance Company, Dr. C. C. Harrold, at the time he was examining him, that Dr. Little had stated to him, Salgue, that he had heart disease, and much evidence was introduced in the joint trial to show that the Aetna Life Insurance Company was estopped from claiming that Salgue had defrauded it in reference to this question. All of this evidence was heard by the jury, and prejudiced the jury, so that it could not give fair consideration to the trial of the issue between Moore, Administrator, and your petitioner. The questions in the respective applications to the two companies were different, and the applications and answers relied upon as defenses were different; the contracts of insurance were different, and the issues involved were essentially different; and your petitioner was greatly injured and prejudiced before the jury in this joint trial as had under this order. This joint trial then proceeded, and after all the evidence was introduced, your petitioner moved the court to direct a verdict in its favor in the following request:

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DIVISION OF THE
SOUTHERN DISTRICT OF GEORGIA.

JOHN T. MOORE, Administrator,
Etc.,

VS.

THE PRUDENTIAL INSUR-
ANCE COMPANY OF AMER-
ICA.

"Now comes the defendant, the Prudential Insurance
ompany of America, by its counsel of record, and moves
e court not to submit said case to the jury, but to direct
verdict in its favor upon the ground that the evidence
troduced upon the trial of said case, with all the in-
rences that the jury can justifiably draw from it, is
sufficient to support a verdict for the plaintiff, and de-
nds that a verdict should be directed in its favor.
igned) McDaniel, Alston & Black, attorneys for de-
dant, the Prudential Insurance Company of America."

his motion for the direction of a verdict in petition-
s favor was refused by the trial court, and exception
he action and the order of the court in refusing same
duly made, and this exception was allowed.

he following reasons were presented to the trial court
upport of this motion: First, that the undisputed evi-
e in the cause showed that Salgue had been rejected
insurance by the Penn Mutual Life Insurance Com-
prior to his application to your petitioner for the
y sued on, and that Salgue had falsely answered the
tions in the application to your petitioner for insur-
relative to prior rejections by any other companies,
at he had then and there answered that he had not

been rejected by any other company, and that this answer was false, and was fraudulently made, and was as to a matter material to the risk, and one tending to vary the character, nature and extent of the risk assumed in the insurance contract signed by him, and that such answer being false, and being as to such material matter, and being warranted to be true, voided the policy contracted for under the law of Georgia, whether such false answer was made fraudulently or innocently by Salgue.

Second, that the undisputed evidence showed that at the time Salgue applied for insurance with your petitioner, he had applications for insurance pending with the Provident Savings Life Insurance Company for $5,000.00 of insurance, and with the Sun Life Insurance Company of Canada for $6,000.00 of insurance, and that in his application to your petitioner, he had answered the question as to the pendency of other applications for insurance in other companies by stating that he had an application pending with the Provident Savings Life Insurance Company for $5,000.00, and by failing to state that he had an application pending with the Sun Life Insurance Company of Canada for $6,000.00 of additional insurance, and that this answer was false, and was known by Salgue to be false, and was as to a material matter, and was warrantied by Salgue to be complete and true, and by reason of its falsity, under the law of Georgia, voided the policy.

Third, that the evidence disclosed that at the time Salgue applied to the Prudential Insurance Company for insurance, and at the time this policy of insurance was issued to him, he was afflicted with heart disease, and that he warrantied that he was in good health, and that this warranty was false, and was known to Salgue to be false, and was as to a material matter, and under the law of Georgia, voided the policy.

Fourth, that the undisputed evidence showed that Salgue had stated, in answer to a question in his medical

examination, relative to the last attendance upon him by a physician, that he was attended in the early spring of 1905 for bilious fever, and that this answer was false, in that he had, subsequent to this attendance upon him in the spring of 1905 for bilious fever, been attended by Dr. J. C. McAfee almost daily for chronic gastritis, and had been treated by Dr. McAfee for heart disease, all prior to the delivery of your petitioner's policy to him, and that this answer was known by Salgue to be false, and that it was as to a material matter, and that it was warrantied to be true, and being so warrantied, its falsity, under the law of Georgia, violated the policy contract. The record of this cause will disclose that these specific grounds urged in the motion for the direction of a verdict in its favor by your petitioner were well taken, and that the court should have directed a verdict upon each and all of them in your petitioner's favor.

Before the jury had retired, and while the cause was pending in open court, before them, and before the trial judge had started to charge the jury, your petitioner requested the trial judge to charge as follows:

"The defendant, the Prudential Insurance Company of America, requests the court to charge as follows: 'Question four (b) of the application of the said John A. Salgue to said Prudential Insurance Company of America is as follows: "Has any company or association ever declined to grant insurance on your life, or issued a policy of a different kind or for a sum less than that applied for? Answer yes or no."' The answer to this question is no. The defendant insists that this answer is false, and says that the said Salgue, in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance, and that this appli-

cation was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Life Insurance Company, to Dr. Little, examiner for the said Penn Mutual Company, for examination, and that Dr. Little, as said examiner, examined the said Salgue, and stated to the said Salgue that he had heart trouble, and for that reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue, and if you believe from the evidence that such application was made, and that such declination was made, then I charge you that the answer of Salgue to this question was false, and that it was warranted to be true, and that it was as to a material matter, which would tend to change the nature, extent and character of the risk assumed, and that in this event, the plaintiff could not recover." This charge the court declined to give, and failed to incorporate in its general charge the principle contended for by this request. To the refusal of the court to make this charge as requested, your petitioner excepted, and its exception was duly allowed by the court. This charge should have been given, because it correctly stated the law applicable to the rejection of Salgue by the Penn Mutual Life Insurance Company prior to his making application to your petitioner, and because it stated the law of Georgia relative to the effect upon the policy of insurance issued by your petitioner to Salgue, of his false answer relative to such rejection, which false answer he warranted to be true. The jury, under the charge of the court, found a verdict in favor of the plaintiff for the full amount sued for, finding a separate verdict against your petitioner. Thereupon, the case was duly taken by writ of error by your petitioner to the United States Circuit Court of Appeals for the Fifth Circuit.

PROCEEDINGS AND ACTION IN CIRCUIT COURT OF APPEALS.

The appeal case was argued before the Circuit Court of Appeals on the 5th day of October, 1910, the court being composed of the Honorable Don A. Pardee, Circuit Judge, the Honorable David D. Shelby, Circuit Judge, and the Honorable Harry T. Toumlin, District Judge. On the 28th day of March, 1911, the Circuit Court of Appeals handed down the following decision:

"UNITED STATES CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT.

No. 2034.

PRUDENTIAL INSURANCE COMPANY vs. JOHN T. MOORE, Administrator.	Error to the Circuit Court of U. S., Southern District of Georgia.

Before Pardee and Shelby, Circuit Judges, and Toumlin, District Judge.

By the Court:

None of the assignments of error are well taken. The judgment of the Circuit Court is affirmed. Pardee, Circuit Judge, does not concur."

In this decision, Circuit Judge Pardee and Circuit Judge Shelby disagreed, and the deciding opinion in the cause fell to District Judge Toumlin. It will, therefore, appear that on the important questions involved in this appeal, the two Circuit Judges disagreed, and the deciding voice in the settlement of such questions was given by the District Judge, who at that time was sitting on the bench of the Circuit Court of Appeals.

There having been no opinion delivered either by the majority of the Court composed of Circuit Judge Shelby and District Judge Tomlin, or by the dissenting Circuit Judge Pardee, your petitioner made no application for a re-hearing.

The following questions of general importance are involved: First, the scope of the discretion of a trial judge of the United States Circuit Court, as measured by his authority under the Federal Statute to sign an order consolidating for trial two or more cases before the same jury. This question is not only of the highest interest as a point of practice in the Federal Courts, but of vital importance to all litigants in those Courts. Can a Federal Judge, under the authority of the Federal Statute, order consolidated for trial two causes in which the parties are different, the contracts different, the defenses radically different, and depending upon different allegations of fact, where different rules of liability exist as to the two respective defendants?

Second, an important general question involved in this cause is as to what conditions constitute a rejection of an applicant for life insurance by an insurance company. This question has not been decided by this Honorable Court, and is a question of the utmost importance to all of the insurance companies, as well as to the general insuring public.

Third, another important general question presented in the cause is as to the effect upon a contract of insurance made in Georgia of a false answer to a question in an application which is as to a material matter affecting the risk, and which is warranted to be true, in a case where the application is made the basis of the contract of insurance applied for. Does such false answer, under such conditions, have to be known to the applicant to be false in order to void the policy? Does the fact that such answer is false, and is warranted to be true, under the law of Georgia, void the policy, even when innocently

made by the applicant? This question has never been decided by this Honorable Court, and is a question of the highest importance to all of the insurance companies operating in Georgia, and to the general insuring public in the state.

AS TO THE CONFLICT OF COURTS.

In the questions involved in this cause, there are conflicts between certain decisions of certain State Supreme Courts on the one hand, and the Circuit Court of Appeals for the Fifth Judicial Circuit on the other hand. These conflicts are of great importance to the insurance companies and to the general insuring public.

First, there is such a conflict between the Supreme Court of New York, the Supreme Court of Michigan, and the Supreme Court of Virginia, on the one hand, and the Circuit Court of Appeals for the Fifth Judicial Circuit on the other hand, as to what facts constitute a rejection by an insurance company of applicants for insurance. The Supreme Court of New York, in the case of Eddington versus the Aetna Life Insurance Company, 77th New York, page 564, holds that certain facts almost exactly similar to the facts in this cause relative to Salgue's rejection by the Penn Mutual Life Insurance Company constitute a rejection. The Supreme Court of Michigan, in the cause of Ferris versus the Home Life Insurance Company 118th Michigan, 485, and the Supreme Court of Virginia, in the cause of the National Life Insurance Company versus Hopkins, 97th Virginia, 167, make similar decisions. The Eddington case in the 77th New York is cited approvedly by this Honorable Court in the case of the Phoenix Insurance Company versus Roddin, 120th United States, 189. The trial Circuit Court, and the Circuit Court of Appeals, by their respective rulings and decisions in this cause, have decided in conflict with these decisions, that such facts as existed in this cause relative

to Salgue's application to the Penn Mutual Life Insurance Company did not in law constitute a rejection, and the Circuit Court of Appeals of the Fifth Judicial Circuit, in a somewhat similar case, to-wit: the case of Langdon versus the Mutual Union Life Insurance Company, 14th Federal Reporter, page 272, has, in a cause relative to a rejection, rendered a decision in conflict with the Supreme Court decisions of the states named. A conflict appears also to exist between the decision of the trial court and the Circuit Court of Appeals in this cause, and the same Circuit Court of Appeals in the Langdon case, 14th Federal Reporter, page 272, and in a case decided by the Circuit Court of Appeals of the Eighth Circuit, to-wit: Webb, et al, versus the Security Mutual Life Insurance Company, 106th Federal Reporter, 808, and 126th Federal Reporter, 635. This conflict on this question between these high courts should be reconciled and settled by this Honorable Court, and it is of the highest importance to the public at large, to all of the insurance companies, and to the insuring public especially, that such conflicts should not exist.

Second, another question in this cause in which there is a direct conflict between the Supreme Court of Georgia, on the one hand, and the trial Circuit Court and the Circuit Court of Appeals for the Fifth Circuit, is as to the effect upon a contract of insurance of an answer made by the applicant for such insurance to a question relative to a matter material to the risk, which answer is warranted by the applicant to be true in those cases where the policy is made the basis of the contract of insurance applied for, and where the answer to such material question is false. These conflicting opinions of the Supreme Court of Georgia on the one hand and the Circuit Court of Appeals for the Fifth Judicial Circuit on the other hand, arise out of different constructions of the state court and the federal courts, respectively, of the Georgia statute. This Georgia statute is as follows: Code of Georgia of 1895, §2097,

"Application, good faith." "Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed, will void the policy."

The Supreme Court of Georgia, in construing this statute, has held that representations, when made, if material, are warranties and that their falsity voids the policy; and, if they are material representations, and the variation from the truth is such as to change the nature, extent or character of the risk, it is immaterial whether the warrantor acted in good faith or in bad faith in making them. This has been held in the following Georgia cases:

> Sun Life Insurance Co. vs. Wilkinson, 53 Ga. 537;
> Northwestern Mutual Life Ins. Co. vs. Montgomery, 116 Ga. 805;
>
> Supreme Conclave Knights of Damon vs. Wood, 120 Ga. 334.

Under these decisions the question of good faith or of bad faith of the warrantor in making a false answer as to a material matter in an application for insurance is not involved. The fact that such false answer was made, and that it was as to a material matter, and that it was warranted to be true, is sufficient, under the construction of this Georgia statute by the Supreme Court of Georgia to void the policy.

On the other hand, in this cause the Circuit trial court and the Circuit Court of Appeals both hold that such false answers had to be made fraudulently in order to void a policy, and the Circuit Court of Appeals, in the Jefford case, in the 107th Federal Reporter, page 408,

held that such false answer must be made fraudulently in order to void a policy. These conflicting opinions are based on different constructions of the statutes of Georgia relative to the effect of the warranties in insurance contracts, and such conflicts are of great detriment to the public at large, to all of the insurance Companies doing business in Georgia, and to the large insuring public. If these conflicts relative to the construction of such Georgia statutes are not reconciled and settled, then a Georgia insurance company has a protection in the state courts of Georgia which is denied to foreign insurance companies when sued in the federal courts located in Georgia.

For the reasons herein set forth, your petitioner asks that writ of certiorari be granted. Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

Your petitioner respectfully shows that the trial court erred in consolidating for trial the case against your petitioner with the case of Moore, Administrator, against the Aetna Life Insurance Company, and that the court erred in refusing to direct a verdict, for the reasons given, in favor of your petitioner, and that the trial court erred in refusing to give the charge requested by your petitioner, and that the decision of the Circuit Court of Appeals in this cause is erroneous in that it confirmed the action of the Circuit Court in the three respects just indicated, and the error complained of herein is the error of the Circuit Court of Appeals in confirming the said erroneous action of the said trial Circuit Court.

Your petitioner has no right of appeal or writ of error herein to this Honorable Court, because the juris-

diction of the Circuit Court depended entirely on diverse citizenship, and shows that the judgment of the Circuit Court of Appeals complained of is final, because that such jurisdiction in this cause was dependent entirely upon diverse citizenship.

Your petitioner shows that it has filed in this Honorable Court a certified copy of the transcript of the record in this case, including all proceedings in the Circuit Court of Appeals, which record will disclose the facts herein set forth relative to the proceedings in both the trial Circuit Court and the Circuit Court of Appeals for the Fifth Judicial Circuit.

By this statement of facts and the record in that cause, your petitioner submits the following reasons why the judgment of the Circuit Court of Appeals confirming the decree of the Circuit Court, should be brought here for review by this court:

First, because of the great importance of the case, as to the public and the parties.

Second, because of the great importance of the case as to all insurance companies and the insuring public.

Third, because of the great importance of the case as to all insurance companies in Georgia, and the insuring public in Georgia.

Fourth, because of the great importance of the case as to what constitutes a rejection of an applicant by an insurance company.

Fifth, because of the great importance of the question as to what effect a false answer to a material question in an application for insurance has upon the contract of

insurance applied for, and as to whether such false answer in Georgia, when warranted to be true, voids the policy applied for, when made innocently, or whether, in such case, in order to void the policy, it must be made fraudulently.

Sixth, because of the conflict of the courts of last resort of some of the states, and the Circuit Court of Appeals for the Fifth Judicial Circuit, as to what constitutes a rejection of an applicant for insurance.

Seventh, because of the conflict between the Circuit Court of Appeals for the Fifth Judicial Circuit and the Circuit Court of Appeals for the Eighth Judicial Circuit, as to what constitutes a rejection of an applicant for insurance by an insurance company.

Eighth, because of the conflict between the Supreme Court of Georgia and the Circuit Court of Appeals for the Fifth Judicial Circuit relative to the construction of the Georgia statute as to the effect of a breach of warranty as to a material matter in an application for insurance.

Ninth, because, under the circumstances heretofore stated, a full consideration of these questions by this Honorable Court will tend to promote justice to all interested.

Wherefore, in view of the premises, petitioner prays that this Honorable Court will grant its writ of certiorari, directed to the Circuit Court of Appeals for the Fifth Judicial Circuit, requiring that the record of said cause in said court, and its decree, be certified to this court, and that this court will thereupon proceed to correct the errors complained of, and reverse the said decree, remanding said cause, and give to your petitioner such other and further relief as the nature of the case may

require, and to the court may seem proper in the premises.

SANDERS McDANIEL,

EUGENE R. BLACK,

EDWARD D. DUFFIELD,

Of Counsel with Petitioner.

Address of Counsel:

Edward D. Duffield,

Newark, New Jersey.

Sanders McDaniel,

Eugene R. Black,

Atlanta, Ga.

STATE OF NEW JERSEY,

COUNTY OF ESSEX.

Edward D. Duffield, being duly sworn, says that he is one of the attorneys and of counsel for the Prudential Insurance Company of America, the petitioner above named, and as such, had charge, in part, for the Prudential Insurance Company of America, of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Southern District of Georgia, and in the United States Circuit Court of Appeals for the Fifth Judicial Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

(Signed) EDWARD D. DUFFIELD.

Sworn to and subscribed before
me, this 21st day of June, 1911.
(L. S.) EDWARD J. WHITNEY,
Notary Public of N. J.

NOTICE OF APPLICATION TO THE SUPREME COURT FOR WRIT OF CERTIORARI.

The Prudential Insurance Company of America, Plaintiff in Error, vs. John T. Moore, Administrator of John A. Salgue, Defendant in Error. } Fifth Judicial Circuit. peals for the United States Court of Ap-

The defendant in error is hereby notified that the plaintiff in error will, on Monday, the ninth day of October.

1911, upon its verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you) to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, D. C.

EDWARD D. DUFFIELD,
SANDERS McDANIEL,
EUGENE R. BLACK,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for writ of certiorari and brief in support of the petition are hereby acknowledged.

This 2nd day of August, 1911.

Signed:- Hunter Wimbish
Akerman and Akerman
Jesse Harris

Attorneys for John T. Moore, Administrator of John A. Salgue, Deceased, Defendant in Error.

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IN THE

Supreme Court of the United States

No. 887.47

OCTOBER TERM 1911

THE PRUDENTIAL INSURANCE CO. OF AMERICA,
PETITIONER,

VS.

JOHN T. MOORE, Administrator of John A. Salgue,
RESPONDENT.

Brief in Support of Petition for Writ of Certiorari

EDWARD D. DUFFIELD,
SANDERS McDANIEL,
EUGENE R. BLACK,
Counsel for Petitioner.

Appeal Pub. Co., Atlanta, Ga.

In the Supreme Court of the United States

No. 670

OCTOBER TERM 1911

The Prudential Insurance Company of America, Petitioner

versus

John T. Moore, Administrator of John A. Salgue, Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We respectfully submit the following reasons for this honorable Court granting a writ of certiorari to review the judgment rendered in this case pursuant to the petition for said writ heretofore filed herein.

The action sought to be reviewed was brought in the Circuit Court of the United States for the Western Division of the Southern District of Georgia, and was based upon a policy of life insurance issued upon the life of one John A. Salgue, a resident of the State of Georgia, to the amount of $5,000. The case was tried before the Honorable Emory Speer, District Judge for the Southern District of Georgia, and resulted in a judgment in favor of the respondent herein. From the judgment so recovered a writ of error was taken by the petitioner to the Circuit Court of Appeals for the Fifth Judicial Circuit, that court being composed of Circuit Judge Pardee, Circuit Judge Shelby and District Judge Toulmin. The grounds upon which a reversal of the judgment was

sought were based upon the following alleged errors committed at the trial:

1. THE ORDER OF THE TRIAL JUDGE CONSOLIDATING FOR TRIAL THE ACTION BROUGHT AGAINST THIS DEFENDANT WITH THE ACTION BROUGHT BY THE SAME PLAINTIFF AGAINST THE AETNA LIFE INSURANCE COMPANY UPON A POLICY OF LIFE INSURANCE ISSUED BY IT UPON THE LIFE OF THE SAID SALGUE.

2. THE REFUSAL OF THE LEARNED TRIAL JUDGE TO DIRECT A VERDICT IN FAVOR OF THE PETITIONER.

3. THE REFUSAL OF THE LEARNED TRIAL JUDGE TO CHARGE THE JURY AS REQUESTED.

The judgment of the Circuit Court was affirmed without opinion by a majority of the Circuit Court of Appeals, Circuit Judge Shelby and District Judge Toulmin voting to affirm and Circuit Judge Pardee dissenting therefrom but also without filing an opinion.

We respectfully insist that the division of the Circuit Court of Appeals in this way creates a situation which should at the outset commend the petitioner for a writ of certiorari to the favorable consideration of this court. The errors alleged to have been committed at the trial by the District Judge presiding therein have by reason of the division of the two Circuit Judges been affirmed by the decision of another District Judge.

The questions raised in the Circuit Court were, as we shall endeavor to show, of large public importance to general litigants, to the insuring public and to those engaged in the business of life insurance, and the rulings complained of were affirmed, as we have stated, without an opinion and by a divided court.

In Forsyth vs. Hammond, 166 U. S. 506, this court laid down the principles which would control it in granting the writ herein applied for, stating that the power to grant the writ was one which would be exercised only in cases of large public importance, or for the purpose of avoiding conflict between two or more Courts of Appeal or between Court of Appeal and the courts of a State, or of some matter affecting the interests of the nation.

We shall endeavor to demonstrate that this application comes within the rule therein laid down, in that the questions are questions of large public importance, that the decision of the Circuit Court of Appeals creates a serious conflict between that court and other Circuit Courts of Appeal, and also brings the Circuit Court of Appeals into a direct conflict with the courts of the various states.

STATEMENT OF FACTS.

John A. Salgue, the respondent's intestate, on or about the Fifteenth day of June, Nineteen Hundred and Five, applied to the Penn Mutual Life Insurance Company to issue upon his life a policy of life insurance to the amount of $6,000. He presented himself to Dr. W. J. Little, Medical Examiner for the Penn Mutual, for the purpose of submitting to a physical examination in order to determine his insurability. In this company the Medical Examiner gave his report to the local agent. This examination disclosed that he was at that time suffering from a mitral murmur of the heart. Dr. Little thereupon told him that his heart was affected and directed him to his family physician, Dr. J. C. McAfee, advising the agent of that company, Mr. Anderson Clark, that he

would not pass him. Salgue thereupon consulted Dr. McAfee, who concurred in the diagnosis previously given by Dr. Little, and so advised Salgue. Agent Clark, upon receipt of the information by Dr. Little that he would not pass Salgue for insurance, advised him of that fact and of the reason therefor, and told him that he could not get a policy with the Penn Mutual Company, that he would hold his examination up and would not make a record of it, and that Salgue should pay Dr. Little's fee in order that he, Salgue, in future applications to other companies for insurance, could answer that he had never been rejected by any company. (See page 72 of record). Thereupon Salgue, within two weeks thereafter, applied to five separate companies for insurance upon his life, aggregating the sum of $27,000. In each instance he was asked whether his application for life insurance had been rejected by any life insurance Company, and in each instance he replied that it had not. (See applications to other companies, pages 48, 93, 107, 121 of record).

His application to the petitioner was made July 6, 1905, and on the same day he was examined by the company's Medical Examiner, Dr. W. R. Winchester. The insured warranted the truth of the answers made both in the application and to the Medical Examiner, and agreed that they should both form a part of the contract for insurance thereby applied for. The petitioner, under date of July 10, 1905, issued its policy of insurance on the life of Salgue to the amount of $5,000, being the policy involved in this action.

In the application, set out on page 139 of record, the following questions and answers appear:

> Q. 4 b. "Has any company or association ever declined to grant insurance on your life, or issued you a policy of a different kind or for a sum less than that applied for? Answer yes or no."
>
> A. "No."

As we have stated, the rejection by the Penn Mutual Company had taken place within about three weeks prior to the time this answer was made.

Q. 4 d. "Is an application for insurance on your life pending at this time in any company?"

A. "Yes. Provident Savings Life."

It appeared by the uncontradicted evidence in the case that at the time this answer was made the applicant had an application for $6,000 pending with the Sun Life Insurance Company of Canada.

These answers were warranted in the application to be **complete and true**, under the following warranty:

"I hereby declare and warrant that I am in good health and of sober and temperate habits, and that all the statements and answers to the above questions are complete and true, that the foregoing, together with this declaration, shall constitute the application and become a part of the contract for insurance hereby applied for.

"And it is agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in the application."

To comply with this warranty the answers had to be both **complete and true**. See Raddin vs. Phoenix Insurance Co., 120 U. S. 189.

In the medical examination set out on page 142 of record, the following questions and answers appear:

Q. 13. "Has your application for insurance ever been rejected, postponed or modified by an insurance company, assessment society, or benevolent order?"

A. "No."

Q. 16. "Are you in good health?"

A. "Yes."

These answers were made within four weeks of the time that the applicant had been advised, both by Dr. Little and Dr. McAfee, that he was suffering from a serious affection of the heart, and after he had been rejected for insurance on account of heart trouble, and treated by Dr. McAfee for heart trouble.

Q. 17. "When were you last attended by a physician?"

A. "Early spring of 1905."

Q. "For what complaint?"

A. "Bilious fever. (?) For two days."

It appeared by the uncontradicted evidence that the assured had been attended by Dr. J. C. McAfee many times in January, March, April and May, 1905, and on June 1, 5, 7, 13 and 15, and on July 1 and 3, 1905, for chronic gastritis, the last attendance having been made within five days from the date of making the above answer, and that he was probably treated by this physician on July 3, 1905, for heart trouble. (See pages 76 and 77 of record).

Q. 23. "Have you ever had dyspepsia?"

A. "No."

It appeared by the uncontradicted testimony of Dr. McAfee that he had treated the insured for this very ail-

ment for a period of some months, and that he had prescribed for him twice within the week preceding the application.

Q. 24. "Have you ever had any serious illness?"

A. "No."

These answers were warranted to be true in the medical examination which contained the following warranty:

"I hereby warrant that the answers to these questions are true, and agree that they shall form a part of the contract for insurance applied for."

The motion to direct a verdict in favor of the petitioner was based upon the falsity of the above answers, which had been warranted by Salgue to be true.

CONSOLIDATION OF ACTION.

The first error alleged is based upon the order of the learned trial judge in consolidating for trial this cause with an action brought by the same plaintiff against the Aetna Life Insurance Company on its policy of life insurance also issued upon the life of Salgue.

The authority of the judge for making the order complained of is that given him in Section 921 of the Revised Statutes of the United States, which reads as follows:

> "When causes of a like nature or relative to the same question are pending before a Court of the United States, or of any Territory, the Court may make such orders and rules concerning proceedings therein as may be conformable to the usages for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

Unless this statute confers upon a trial judge an absolute power not subject to the review of this court to consolidate at his own discretion any actions pending before him, the limitations that are to be placed upon such power is a question which interests every party litigant in a federal court, and the limitations and extent of such power should be authoritatively determined by this court.

The cases in which this section has been under consideration by the federal courts are as follows:

Wabash Railway Co. vs. Central Trust Co., 23 Fed. 515;

Weide vs. Insurance Co. of North America, Fed. Cases. No. 17, 617;

Denver City Tramway Co. vs. Norton, et al, 141 Fed. 599;

Mutual Life Ins. Co. vs. Hillman, 145 U. S. 285.

In each instance the action of the trial judge in ordering the consolidation of causes pending before him has been approved by the Appellate Court, but in each instance the approval has been based upon the ground that the interests involved, the questions to be determined, the parties to the controversy, or the evidence to be submitted in relation thereto would be the same in both cases. Our understanding of the statute is that the authority of a trial judge is limited to these classes of cases. If our understanding is correct and the power is so limited, then its exercise in the present case was unwarranted and the judgment rendered under these circumstances should be reversed.

In the present case the actions were based upon two different policies of life insurance issued by two separate corporations at different times, containing different provisions and involving separate and distinct defenses. Each company interposed the defense that the policies were both voided by the misstatements of the insured as

to the prior rejection by the Penn Mutual Company. In the Aetna case, however, the plaintiff contended that the misrepresentation made by the insured had been waived by the Aetna company and that the insured had disclosed to that company's agent and Medical Examiner the facts surrounding the rejection by the Penn Mutual Company, and admitted fully and freely all the facts surrounding that transaction. No question of waiver was raised in the action brought against the Prudential Company. The result of the consolidation was that the court admitted the testimony of Mr. B. H. Ray, Agent of the Aetna Life Insurance Company, Dr. C. C. Harrold, its Medical Examiner, and the plaintiff, John T. Moore, for the purpose of showing a disclosure to that company of the facts and circumstances surrounding the application to and rejection by the Penn Mutual Company. All of this evidence was clearly inadmissible as against the Prudential Company. The injury done to the Prudential Company to submit this testimony to the jury is so manifest as to make argument unnecessary. Not only did it prejudice the jury, but an examination of the charge of the learned trial judge will disclose that it also prejudicially affected him. By referring to the charge it will be observed that after commenting at length upon the testimony referred to, the learned trial judge says (page 217):

> "This evidence is all undisputed and is highly important, particularly in connection with the manner in which this insurance was solicited and pressed upon Salgue, and the hesitancy which he manifested in accepting it, the disclosures as to what the doctors had said about his heart trouble, which he communicated to the Agents and to Dr. Harrold. * * * All of this should be carefully considered by you in reaching a conclusion as to whether or not he had a purpose to secure insurance by acting in bad faith toward one or the other of these insurance companies, as the evidence may relate thereto."

His reference to "Agents" and "to one or the other

of these insurance companies" could not but have impressed the jury with the fact that this testimony was applicable to both companies, notwithstanding the fact that no such information had ever been communicated to an Agent of the Prudential Company. At no point in his charge did the learned judge caution the jury that this testimony was not to be considered by it in connection with their determination of the liability of the petitioner.

The question is therefore clearly presented to this court as to whether the power conferred by the statute is an arbitrary one which may be exercised by a judge without restraint so as to admit prejudicial testimony inadmissible as against one defendant, and to thereafter instruct the jury that they are to carefully consider such inadmissible testimony in reaching their conclusion against both defendants.

We respectfully submit that the importance of the determination of the question hereby raised is of such magnitude as to clearly warrant the interposition by this court, and that its correct determination is of such importance to litigants as to require this court to give it the consideration which will be given by the granting of the writ herein prayed for in which the matter complained of may be properly reviewed.

FAILURE TO DIRECT A VERDICT IN FAVOR OF THE PETITIONER.

The questions involved under this head are of the highest importance, both to companies issuing policies of life insurance, and to the insuring public generally,

and are of special importance to life insurance companies operating in the State of Georgia and to the insuring public in that state.

They also raise questions which brings the Circuit Court of Appeals for the Fifth Judicial Circuit into direct conflict with the Circuit Court of Appeals for the Eighth Judicial Circuit, as well as the courts of various states. The motion to direct a verdict was based upon the false answers made by the insured to the questions in the application and to the Medical Examiner. The refusal to grant the motion and to direct a verdict by the trial judge and the affirmance of his action by the Circuit Court of Appeals for the Fifth Judicial Circuit raises for consideration the following questions:

I. The effect of the misstatement or concealment of a material fact by an applicant for life insurance of which he had knowledge at the time of making his application.

II. The effect of the statute of the State of Georgia relative to a breach of warranty where the policy issued is, under the law, a Georgia contract.

III. What facts constitute in law a rejection by an insurance company of an applicant for insurance.

If the above decision is to stand, it will result in a serious conflict between courts as follows:

First. A conflict between the Supreme Court of the State of Georgia, the courts of certain other states and the Circuit Court of Appeals for the Fifth Judicial Circuit relative to the effect of a misstatement by an applicant for life insurance of a material fact within his knowledge.

Second. A conflict between the Supreme Court of the State of Georgia and the Circuit Court of Appeals for the Fifth Judicial Circuit as to the construction of the Geor-

gia statutes relative to a breach of warranty where the policy issued is, under the law, a Georgia contract.

Third. A conflict between courts of certain of the states and the Circuit Court of Appeals for the Fifth Judicial Circuit as to what facts constitute in law a rejection by an insurance company of an applicant for life insurance.

Fourth. A conflict between the Circuit Court of Appeals for the Fifth Judicial Circuit and the Circuit Court of Appeals for the Eighth Judicial Circuit as to the question of rejection.

I.

THE EFFECT OF THE MISSTATEMENT OR CONCEALMENT OF A MATERIAL FACT BY AN APPLICANT FOR LIFE INSURANCE OF WHICH HE HAD KNOWLEDGE AT THE TIME OF MAKING HIS APPLICATION.

The learned trial judge in his charge to the jury laid down the following principles as controlling them in relation to the question of misrepresentations or concealment by the insured in applying for life insurance (page 216):

> "You are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of which he had knowledge. If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications. And, third, in connection with this your inquiry will be, if such material misrepresentation or

concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgae wilfully or fraudulently done. In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant. If, on the other hand, you find that there was misrepresentation or concealment of which Salgue had knowledge, that it was material and would have influenced and controlled one or both of the defendants not to issue the policy of insurance, and, third, that it was a wilful or fraudulent misrepresentation or concealment, then you should find against the plaintiff and in favor of the defendants as the facts may relate to the policy under consideration."

Based upon this view of the law the learned trial judge had previously denied the petitioner's motion for the direction of a verdict. The affirmance of his action by the Circuit Court of Appeals for the Fifth Judicial Circuit is, therefore, an approval by that court of his views as above expressed. An analysis of the above portion of the charge shows that the learned trial judge held that in order that a material misstatement should operate to defeat the policy the following facts must be found:

(1) That it must be a misrepresentation of which the insured had knowledge.

(2) That it must relate to a matter of such a material character as to have influenced the company not to have issued the policy.

(3) That it must have been done wilfully.

We submit that whether these misstatements by the insured be treated as warranties or as representations,

the law as above stated is erroneous in that there is submitted to the jury, first, the determination as to whether the statements were in fact material, and, second, whether, assuming that they had been made on matters of which the insured had knowledge and were material to the issuance of the risk, they were made by the insured wilfully and fraudulently.

The rule is well settled that where the facts are uncontradicted, as in this case, the materiality of the representation is for the court and not for the jury. See

Fidelity Mutual Life Asso. vs. Miller, 92 Fed. 63, an opinion of the United States Circuit Court of Appeals for the Fourth Judicial Circuit;

Home Life Ins. Co. vs. Myers, 112 Fed. 846, an opinion by the Circuit Court of Appeals for the Eighth Judicial Circuit.

It is also well settled that if the misstatement relates to a fact within the knowledge of the insured, and the same is material to the risk, his motive in so stating is immaterial and the policy is voidable.

Referring to the specific cases upon this point, we desire to call the court's attention to the following:

Finn vs. Metropolitan Co., 70 N. J. L. 255;

Fletcher vs. Bankers Life Ins. Co., 119 N. Y. Supp. 801.

In the case of Northwestern Insurance Company vs. Montgomery, 116 Ga. 805, the Supreme Court of that state uses the following language:

"Of course intention is generally a question for the determination of the jury and the conduct of the parties as showing the fraudulent intent is generally for their consideration, but in the present case the facts were such that they could properly

have made but one finding. The applicant for insurance made in his application a false statement with reference to a material fact. This statement was false within his knowledge. It was made with a view to procuring insurance, was made deliberately and with an agreement that it should be regarded as a warranty and as a part of the consideration of the contract of insurance. The company had no notice of its falsity, but acted upon it to its injury. Purposely misstating this material fact in order to induce the company relying upon it to enter into a contract which might prejudice its rights would be consistent with no other intention than one to deceive the company. Intention to deceive, coupled with the other facts in the case, conclusively shows fraud in the legal acceptation of the term. What the applicant thought or intended with reference to the consequences of the falsity cannot be material. He is presumed to have intended the natural consequences of what he purposely and knowingly did. We are therefore of the opinion that the company completely made out its defense and that the evidence of the plaintiffs was insufficient to overcome it. We are also of the opinion that the court erred under the evidence deduced in leaving the jury free to find that there was no bad faith or intent to deceive on the part of the insured and that a verdict for the plaintiffs would be authorized."

We respectfully submit that this language is directly applicable to the case now under consideration, and that if the court of that state correctly enunciated the law to be applied herein, a verdict should have been directed in favor of the petitioner

In the case of Webb vs. Security Mutual, 126 Fed. 635, a case in which the facts were quite similar to the case now under consideration, Judge Hook, speaking for the

Circuit Court of Appeals for the Eighth Judicial Circuit, uses the following language:

> "An applicant for a policy of insurance has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit. Nor will good faith excuse him if the answer is untrue. * * * The answer which was given to the question was untrue instead of being true and full and complete, as it should have been, and therefore the policy of insurance obtained from the defendant by means of such answer is void."

All of the facts on which the admitted misstatements of the insured in this case were made were clearly material to the risk. They related to the rejection by the Penn Mutual Company, to recent treatment by a physician for a serious illness, to the pendency of an application in the Sun Life Insurance Company and to the condition of the applicant's health; they were all facts peculiarly within the knowledge of the insured and of which the insuring company had no knowledge, relying entirely upon the truth of the statements made by the insured. They were all of such recent occurrence as must have impressed themselves upon the insured's mind. Under these circumstances, we submit that by the uniform rule above enunciated the petitioner was entitled to have the court direct a verdict in its favor, and that his refusal so to do upon the grounds stated by him and the affirmance of his action in this connection by the Circuit Court of Appeals for the Fifth Judicial Circuit brings that court into direct conflict with the other courts above referred to. It would therefore seem that the questions sought to be raised herein were ones within the rule justifying the issue of the writ herein applied for.

II.

THE EFFECT OF THE STATUTE OF THE STATE OF GEORGIA RELATIVE TO A BREACH OF WARRANTY WHERE THE POLICY ISSUED IS, UNDER THE LAW, A GEORGIA CONTRACT.

The statute of Georgia relative to a breach of warranty by an applicant for insurance is as follows:

> "Every application for insurance must be made in the utmost good faith and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature or extent or character of the risk is changed will void the policy." (Code of Georgia, 1895, Sec. 2098.)

This section has been construed many times by the Supreme Court of Georgia. It has uniformly been held in construing it that a false answer made by an applicant for insurance to a question contained in the application involving a material matter, which false answer was warranted to be true, would void the policy, whether such false answer was or was not made with fraudulent intent. See

> Southern Life Ins. Co. vs. Wilkinson, 53 Ga. 550;
> Northwestern Ins. Co. vs. Montgomery, 116 Ga. 805;
> Supreme Conclave Knights of Damon vs. Wood, 120 Ga. 335.

It will be of interest to note that former Circuit Judge Taft, in the case of Penn Mutual Life Insurance Company, versus Mechanic's Savings Bank and Trust Company, 72 Federal Reporter, page 418, has construed a statute of Pennsylvania which is similar to this Georgia statute, and has given the same construction to the Penn-

sylvania statute as is given by the Georgia Court to the Georgia statute.

The only distinction made by the Supreme Court of Georgia in considering an insurance warranty and in considering warranties in reference to other contracts is that the breach of a warranty as to any other kind of contract in Georgia voids the contract; whereas, the breach of an insurance warranty in this state voids the insurance contract only when such warranty is as to a material matter tending to vary the nature, character, or extent of the risk assumed in the insurance contract by the insuring company.

It is respectfully submitted that this is the law of Georgia, and this was a Georgia contract made under this law, and, that this Georgia law being controlling, the trial court was obliged, where the undisputed evidence showed that the insured had made false answers to certain questions contained in his application and had warranted such false answers to be true and where such answers warranted to be true were material and such as to effect the nature of the risk assumed, to declare the policy void and direct a verdict for your petitioner The decision in this case raises a direct conflict between the Circuit Court of Appeals for the Fifth Judicial Circuit and the Supreme Court of the State of Georgia in connection with the construction to be given to the statute of Georgia which controls the contract of insurance under consideration.

III.

WHAT FACTS CONSTITUTE IN LAW A REJECTION BY AN INSURANCE COMPANY OF AN APPLICANT FOR INSURANCE.

The petitioner requested the learned trial judge to direct a verdict in its favor upon the specific ground that

the insured had misstated in his application the facts in connection with his rejection by the Penn Mutual Company.

The facts on this point were not in dispute, and were as above outlined. The learned trial judge denied the petitioner's motion, and stated his grounds for so doing in his charge to the jury on this point, which was as follows (page 227):

> "It is, however, insisted that Salgue was guilty of fraud which should vitiate the policies because he withheld the fact that he had been rejected by the Penn Mutual, and it is insisted by defendant's counsel that the facts show a rejection to be determined by the court as a matter of law. The court has not been able to agree with this contention, and leaves the question to the jury, it being a mixed question of law and fact. It does not appear, so far as I recall the evidence, that the Penn Mutual ever definitely informed Salgue that his application was rejected, although Dr. Little informed him that he could not recommend him. Dr. McHatton, you will recall, testified that sometimes companies did not heed the recommendations of the local examiners. But the application, as I recall the evidence, was never sent to the home company at all. Dr. Little gave it to Anderson Clark, the local agent of that company, and Anderson Clark himself testified that he told Salgue if he would pay Little's fee he would not send the application to the company and that it would not be regarded as a rejection. The fee was paid and if you believe from the evidence that Salgue in good faith accepted the statement of Anderson Clark as true, and that when he said he had not been rejected he in good faith acted upon the information thus imparted by the company's agent, you would not be justified on this ground, so far as that company is concerned, in holding that fraud should be imputed to him because he said he had not been rejected for insurance. The question depends upon

his integrity of purpose, and the presence or absence of good faith on his part, and that is entirely a question for your consideration."

The law as herein enunciated, which has been approved by the Circuit Court of Appeals for the Fifth Judicial Circuit, brings that court into direct conflict with the Circuit Court of Appeals for the Eighth Judicial Circuit. It also brings it into direct conflict with courts of various states.

A case in which the facts were almost identical with that under consideration was the case of Security Mutual vs. Webb, 106 Fed. 808; 126 Fed. 635. In this case an application having been made to direct a verdict upon the ground of the misstatement of a prior rejection where the facts were quite similar to the case under consideration and the motion was denied, the Circuit Court of Appeals, in reviewing this action of the trial judge, held the same to be erroneous. Thereupon, upon a second trial, a motion was directed upon this ground and the action of the trial judge in so directing was affirmed by the Circuit Court of Appeals.

In the case of Eddington vs. Aetna Life Insurance Co. 77 N. Y. 564; 100 N. Y. 536, the facts were less strong than those now under consideration, and the Court of Appeals for the State of New York held that the misstatements as to rejection voided the policy. This court in the case of Phoenix Ins. Co. vs. Radden, 120 U. S. 189 has spoken with approval of this decision by the Court of Appeals of the State of New York To like affect are the following cases:

Ferris vs. Home Life Ins. Co., 118 Mich. 485;
National Life Ins. Co. vs. Hawkins, 97 Va. 167; 33 S. E. Rep. 539;
Mutual Life Ins. Co. of New York vs. Nichols, 26 S. W. Rep. 998, (Court of Civil Appeals of Texas.)

The Circuit Court of Appeals for the Fifth Judicial Circuit, both in this case and in the case of Langdon vs. Union Mutual Life Ins. Co., 14 Fed. 275, seem to have taken a contrary view. Under these circumstances that court is brought into direct conflict with the Circuit Court of Appeals for the Eighth Judicial Circuit in the views expressed by the latter court in the Webb case, as well as in the various state courts above referred to. That the rule to be applied should be the rule adopted in the Webb case and the state courts rather than the rule adopted in the Langdon case is peculiarly illustrated in the case under consideration. It should be noted that the agent of the Penn Mutual Company purposely destroyed the application to that company and directed the insured to conceal the facts from other companies to whom he had made application. In other words, the concealment was done deliberately for the prupose of deceiving other companies to whom the insured might thereafter apply for insurance. It seems almost farcical to submit to a jury the question of the good faith of a man who, following the instructions of a life insurance agent, had deliberately, wilfully and purposely concealed from an insuring company the facts in connection with his prior application and rejection for insurance.

We therefore respectfully submit that under the facts of this case the petitioner is entitled to the relief which it seeks, and that this court should permit a writ of certiorari in order that it may review the judgment, which we submit was erroneously entered against the petitioner.

THE REFUSAL OF THE LEARNED TRIAL JUDGE TO CHARGE THE JURY AS REQUESTED.

The petitioner requested the learned trial judge to instruct the jury that the misstatement and concealment

by the insured, of the facts surrounding his application to the Penn Mutual Company and his rejection by that Company, voided the policy. The court refused so to charge upon the same grounds on which he based his refusal to direct a verdict.

We have covered this point so fully in that portion of our argument relating to the refusal to direct a verdict that it is unnecessary to restate it here.

We respectfully submit, however, that the petitioner was entitled, under the authorities above quoted, to the instructions prayed for.

CONCLUSION.

We therefore respectfully urge that this court should grant the petition for the issuance of a writ of certiorari,

First. Because the order of consolidation raises a question of the utmost public importance.

Second. Because the refusal of the learned trial judge to direct the verdict and to charge the jury as requested was erroneous in the following particulars:

(a) In relation to the effect of the misstatement or concealment of a material fact by an applicant for life insurance of which he had knowledge at the time of making his application.

(b) In relation to the effect of the statute of the State of Georgia relative to a breach of warranty where the policy issued is, under the law, a Georgia contract.

(c) In relation to the facts constituting in law a

rejection by a life insurance company of an applicant for life insurance.

These erroneous rulings having been affirmed by the Circuit Court of Appeals for the Fifth Judicial Circuit, a conflict has thereby arisen between that court and the Circuit Court of Appeals for the Eighth Judicial Circuit, as well as the courts of certain of the states.

We would respectfully submit, therefore, that this is a case in which, as said by this court in the case of Forsyth vs. Hammond, 166 U. S. 506, at page 514, the writ should be granted because it is a case in which there has arisen "the necessity of avoiding conflict between two or more Courts of Appeal and between Courts of Appeal and the Courts of a State;" and comes within the rule laid down in that case also in that it involves questions of large public importance.

Respectfully submitted,

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SANDERS McDANIEL,
EUGENE R. BLACK,
Of Counsel for Petitioner.

Office Supreme Court, U. S.
FILED.
SEP 30 1911
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1911.

No. 887. 47

PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER.

vs.

JOHN T. MOORE, ADMINISTRATOR OF JOHN A. SLAGUE, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MINTER WIMBERLY,
JESSE HARRIS,
ALEXANDER AKERMAN,
CHARLES AKERMAN,
Counsel for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1911.

No. 670.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER,

vs.

JOHN T. MOORE, ADMINISTRATOR OF JOHN A. SLAGUE, RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth District.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION.

This honorable court is asked by the petition to review a decision by the Circuit Court of Appeals for the Fifth Circuit affirming a verdict and judgment recovered by the respondent against the petitioner in the United States Circuit Court for the Western Division of the Southern District of Georgia, upon a policy of life insurance.

The grounds upon which petitioner prays for the writ of certiorari may be grouped into three, as follows:

1st. Because the Circuit Court erred in ordering the case of the same plaintiff against the

Aetna Life Insurance Company tried together with the case against the petitioner.

2nd. Because the Circuit Court erred in refusing to charge, as requested by petitioner, in reference to statements made by the insured to the agent and examiner of the Company and not incorporated in the application.

3rd. Because the Circuit Court erred in refusing to direct a verdict for the defendant.

Certiorari, When Granted.

This honorable court has laid down the rule that writ of certiorari will only be granted upon questions of gravity and importance or where there are such conflicts in decisions of State Courts or Circuit Courts of Appeal with that of the Circuit Court or this honorable Court as will require a settlement and final decision of such conflicts.

We respectfully submit that careful investigation of the cases cited in petitioner's brief in support of the petition for certiorari will show that there is no conflict with the decision of the Circuit Court of Appeals made in the case at bar. Surely the decision of the Circuit Court of Appeals is not one of public interest or a public question that will require this honorable court to have the Circuit Court of Appeals certify this case to this Court.

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked."

Exparte Lau Ow Bew 141 U. S. 583.
Exparte Woods 143 U. S. 202.

I.

The power of the trial court to consolidate causes where the same questions are involved is prescribed by Section 921 of the Revised Statutes, and that this power can only be exercised and determined by an inspection and comparison of the pleadings in the case. The pleadings in the two cases in which the consolidation was ordered virtually set out the same state of facts for the plaintiff and the same state of facts for the defendant. It was impossible for the trial court to look into the future and see that the several defendants would offer different testimony. Therefore, we respectfully contend that the pleadings in the Prudential case only being before this court, that it cannot properly review a question of abuse of discretion by the trial court.

"Under Rev. Stat. Sec. 921, a court of the United States may order actions against the insurers of the same life, in which the defense is the same, to be consolidated for trial against their objection."

Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285.

II.

In the brief of petitioner, it is claimed that the Circuit Court refused to give certain instructions to the jury in the face of two decisions of this Court, which sustain the right of the petitioner to have such instructions given. If this contention be true, which is by no means conceded, it was mere error by the trial court and would be no ground for the grant of the writ of certiorari.

Ex Parte Lau Ow Bew and other cases cited supra.

The evidence in regard to the statements made by the insured to the agent and medical examiner was admitted solely for the purpose of illustrating the good faith of the insured and was carefully limited to such purpose by the trial judge in his charge.

Record, page 231.

III.

We think that the conflict between the Supreme Court of Georgia in the Wood case (120 Ga. 328) and the Circuit Court of Appeals in the Jeffords case (107 Fed. 402) is more fanciful than real, as both cases at last leave the issues to be determined by the jury. But if there is a conflict between the State and the United States Courts on questions of insurance, we contend, that life insurance being a question of general commercial law, the United States Courts are not bound by the decisions of the State Courts, but should decide such cases upon their own independent judgment.

Carpenter v. Insurance Co., 16 Peters, 495.
Swift v. Tyson, 16 Peters, 1.
Watson v. Tarpley, 18 Howard, 517.
N. Y. C. R. R. v. Lockwood, 17 Wall, 357.
Pine Grove Township v. Talcott, 19 Wall, 666.
Oates v. First National Bank, 10 Otto, 239.
Mutual Life Insurance Co., v. Lane, 151 Fed., 276.

(The last case above was affirmed by the Circuit Court of Appeals, 157 Fed., 1002, and certiorari denied by the Supreme Court, 208 U. S., 617.)

We respectfully submit that the Circuit Court of Appeals should not be required to reverse its independent judgment rendered in the Jeffords case (107 Fed. 402 in which case it followed the decision of this court in Moulor v. Insurance Co., 111 U. S. 335), and follow a subsequent decision of the Supreme Court of Georgia on a question of general commercial law.

MINTER WIMBERLY,
JESSE HARRIS,
ALEXANDER AKERMAN,
CHARLES AKERMAN,
Attorneys for Respondent.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Petitioner

vs.

JOHN T. MOORE
Administrator of John Andrew Salgue, Deceased,
Respondent

No. 337
October Term, 1912
Supreme Court
of the
United States

Brief and Argument of Sanders McDaniel, Eugene R. Black, and Edward D. Duffield,

Of Counsel for Petitioner

STATEMENT OF THE CASE.

This action was brought in the Circuit Court of the United States for the Western Division of the Southern District of Georgia, and was based upon a policy of life insurance issued by The Prudential Insurance Company of America upon the life of one John A. Salgue, a resident of the State of Georgia, for the amount of $5,000.00.

The case was tried before the Honorable Emory Speer District Judge for the Southern District of Georgia, and a jury in that court, and resulted in a verdict and judgment in favor of John T. Moore, Administrator, the respondent herein, as against The Prudential Insurance Company of America, the petitioner herein.

Two defenses were introduced to this action in the trial court, as follows:

First, that the policy of insurance sued upon had been rendered void by reason of certain false answers made by the insured to material questions contained in the application for the insurance and in the medical examination

for such insurance, the answers to such questions having been warranted by the insured to be complete and true.

Second, that the policy sued upon had never become effective, because it had not been delivered to the insured while he was in good health, the insured having contracted that the policy applied for should not take effect unless it was delivered while he was in good health.

Upon the call of the case in the Circuit Court for trial, the District Judge presiding ordered this cause consolidated for trial with the cause of John T. Moore, Administrator of John A. Salgue, deceased, versus the Aetna Life Insurance Company, a cause pending in that court, brought by the same plaintiff against the Aetna Life Insurance Company upon a policy of insurance issued by that Company to John A. Salgue. To this order of consolidation of these two causes for trial, petitioner objected, and filed its exception, and its exception to this order was duly allowed by the Court.

At the conclusion of the evidence in the case, petitioner moved the Court for the direction of a verdict in its favor. This motion was denied, and to this denial the petitioner filed its exception, which was duly allowed by the Court.

Prior to the charge of the Court, petitioner requested the Court in writing to charge the jury as follows: "The defendant, The Prudential Insurance Company of America, requests the Court to charge as follows: Question 4 (b) of the application of said John A. Salgue to said The Prudential Insurance Company of America is as follows: 'Has any company or association ever declined to grant insurance on your life, or issued a policy of a different kind or for a sum less than that applied for? (Answer "Yes" or "no").' The answer to this question

is "no." The defendant insists that this answer is false, and says that the said Salgue, in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance, and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, examiner for the said Penn Mutual Company, for examination, and that Dr. Little, as such examiner, examined the said Salgue, and stated to the said Salgue that he had heart trouble, and for that reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue; and if you believe from the evidence that such application was made, and that such declination was made, then I charge you that the answer of Salgue to this question was false, and that it was warranted to be true, and that it was as to a material matter, which would tend to change the nature, extent and character of the risk assumed, and that in this event, the plaintiff could not recover." This request to charge was refused by the Court, and to the Court's refusal to so charge, petitioner filed its exception, and its exception was allowed.

The result of the trial was a verdict and judgment against petitioner, The Prudential Insurance Company of America, in favor of John T. Moore, Administrator, respondent.

From the judgment so recovered, a writ of error was taken by your petitioner to the Circuit Court of Appeals

for the Fifth Judicial Circuit. The grounds upon which a reversal of the judgment was sought were based on the following alleged errors committed at the trial.

First: The order of the trial court ordering consolidated for trial this cause with the cause of John T. Moore, Administrator of Salgue, versus the Aetna Life Insurance Company.

Second: The refusal of the court to direct a verdict for the defendant.

Third: The refusal of the court to charge the jury as requested.

The judgment of the Circuit Court was affirmed without opinion by a majority of the Circuit Court of Appeals for the Fifth Judicial Circuit, one Circuit Judge dissenting.

Petitioner then filed to this Honorable Court a petition for grant of a writ of certiorari, and this petition was granted, and the cause, by certiorari, brought to this Honorable Court for its review.

SPECIFICATION OF ERRORS RELIED UPON.

First: The order of the Court consolidating for trial this cause with the cause of John T. Moore, Administrator of John A. Salgue, versus the Aetna Life Insurance Company.

Second: The refusal of the trial court to direct a verdict in favor of your petitioner, which was the defendant in the trial court.

Third: The refusal of the trial court to charge the jury

as requested by your petitioner, which was the defendant in the trial court.

BRIEF AND ARGUMENT.

I.

THE TRIAL COURT COMMITTED ERROR IN ORDERING CONSOLIDATED FOR TRIAL THIS CAUSE WITH A CAUSE BROUGHT BY THE SAME PLAINTIFF AGAINST THE AETNA LIFE INSURANCE COMPANY ON ITS POLICY OF INSURANCE ALSO ISSUED UPON THE LIFE OF THE INSURED, JOHN A. SALGUE.

This order of consolidation was as follows:

"John T. Moore, Administrator of the Estate of John Andrew Salgue, Deceased. *vs.* The Prudential Insurance Company of America.	Action on Insurance Policy.
"John T. Moore, Administrator of the Estate of John A. Salgue, Deceased *vs.* The Aetna Life Insurance Company of Hartford, Conn.	Action on Insurance Policy."

"It appearing to the Court that the above stated causes pending in this court are of like nature, and relative to the same and similar questions, and involving issues similar in their character, and that it will avoid unnecessary costs and delay to try said causes together before the same jury:

"It is, upon consideration thereof, ordered by the Court that said causes be tried together before the same jury, and that the jury render separate verdicts.

"In open court, May 13th, 1909.

"(Signed) EMORY SPEER, Judge."

(See pages 27 and 28 of the record.)

This order was based upon the opinion of the Court that the two causes consolidated for trial were of a like nature, and relative to the same and similar questions, and involved issues similar in their character. In this opinion and conclusion, the trial court was in error, for the following reasons:

First: The respective cases were based upon two different contracts for insurance. (For policy contracts, see pages 28 and 35 of the record.) The contracts were based upon applications essentially dissimilar. (For copy of application to the Aetna Insurance Company, see pages 39, 40, 41 and 42 of the record. For copy of application to the Prudential Insurance Company, see pages 108, 109 and 110 of the record). Questions 14 and 19 in the Aetna application involve matters which were not in the Prudential application; the defenses of the Aetna case were based in part upon the falsity of the answers to those two questions, and no such defenses existed in the Prudential case.

Second: The two causes involved separate and distinct defenses. Each Company introduced the defense that the policies were both voided by the misstatements of the insured as to the previous rejection by the Penn Mutual Company. In the Aetna case, however, the plaintiff contended that the misrepresentation made by the insured had been waived by the Aetna Company, and that the insured had disclosed to that Company's agent and medi-

cal examiner the facts surrounding a rejection by the Penn Mutual Company, and admitted fully and freely all the facts surrounding that transaction. No question of waiver was raised in the action brought against the Prudential Company; nor was it contended that the insured had disclosed to it any of the facts in connection with the application to the Penn Mutual Company. The result of the consolidation was that the Court admitted the testimony of B. H. Ray, agent of the Aetna Life Insurance Company (see pages 116, 117 and 118 of the record), the testimony of Dr. C. C. Harrold, its medical examiner (see pages 124 to 132 of the record), and the evidence of the plaintiff, John T. Moore (see pages 149 to 157 of the record), for the purpose of showing the disclosure to The Aetna Company of the facts and circumstances surrounding the application to and rejection by the Penn Mutual Company. All of this evidence was clearly inadmissible as against the Prudential Company; the injury done to the Prudential Company by the submission of this testimony to the jury is so manifest as to make argument unnecessary. Not only did it prejudice the jury, but an examination of the charge of the learned trial Judge will disclose that it also prejudicially affected him. By referring to the charge, it will be observed that, after commenting at length upon the testimony referred to, the learned trial Judge says (page 170 of the record) "This evidence is all undisputed, and is highly important, particularly in connection with the manner in which this insurance was solicited and pressed upon Salgue, and the hesitancy which he manifested in accepting it, the disclosures as to what the doctors had said about his heart trouble, which he communicated to the agents and to Dr. Harrold," - - - - - - All of this should be carefully considered by you in reaching a conclusion as to whether or not he had a purpose to secure insurance by acting in bad faith towards one or the other of these Insurance Companies, as the evidence may relate there-

to." His reference to the agents and to one or the other of these Insurance Companies could not but have impressed the jury with the fact that this testimony was applicable to both Companies, notwithstanding the fact that no such information had ever been communicated to the agent of the Prudential Company, and at no point in his charge did the learned Judge caution the jury that this testimony was not to be considered by it in connection with their determination of the liability of your petitioner, the Prudential Insurance Company.

The authority of a trial court for making the order complained of is that given in section 921 of the Revised Statutes of the United States, which is as follows:

> "When causes of a like nature or relative to the same question are pending before a Court of the United States, or of any territory, the Court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

Our contention is that this statute does not confer upon the Court an arbitrary or unlimited power, but one that may only be exercised under the conditions prescribed by the statute and where such exercise is reasonable and may be done without injury to a party litigant. The cases in which this section has been under consideration by the Federal Courts are as follows: Wabash Railway Company versus Central Trust Company, 23rd Federal Reporter, 545; Weide versus Insurance Company of North America, Federal cases No. 17617; Denver City Tramway Company versus Lawton, et al., 141st Federal Reporter, 599; Mutual Life Insurance Company versus Hillman, 145 U. S. 285.

In each instance, the action of the trial Judge in ordering a consolidation of causes pending before him has been approved by the appellate court, but in each instance the approval has been based upon the ground that the interests involved, the questions to be determined, the parties to the controversy, or the evidence to be submitted in relation thereto, would be the same in both cases. Our understanding of the statute is that the authority of the trial judge is limited to those classes of cases, and if our understanding is correct, and the power is so limited, then its exercise in the present case was unwarranted, and the judgment rendered under those circumstances should be reversed.

II.

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO DIRECT A VERDICT FOR THIS PETITIONER, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, THE DEFENDANT IN THE TRIAL COURT.

A verdict should have been directed for two reasons:

(a) BECAUSE CERTAIN ANSWERS OF THE INSURED TO MATERIAL QUESTIONS ASKED HIM IN HIS APPLICATION FOR INSURANCE AND IN THE MEDICAL EXAMINATION FOR SUCH INSURANCE, WERE SHOWN BY THE UNDISPUTED EVIDENCE TO BE FALSE, THEREBY VOIDING THE POLICY.

(b) BECAUSE THE UNDISPUTED EVIDENCE DISCLOSED THAT THE POLICY WAS NEVER DELIVERED TO THE INSURED WHILE HE WAS

IN GOOD HEALTH AND UNDER THE INSURANCE CONTRACT, ITS DELIVERY WHILE HE WAS IN GOOD HEALTH, WAS A CONDITION PRECEDENT TO THE POLICY CONTRACT TAKING EFFECT.

(4) THE POLICY WAS VOIDED BY REASON OF INCOMPLETE AND UNTRUTHFUL ANSWERS MADE BY THE INSURED TO MATERIAL QUESTIONS ASKED HIM IN THE APPLICATION AND MEDICAL EXAMINATION.

The answers made by the insured which were false, were warranted to be complete and true. On his application for insurance, the insured made the following warranty: "I hereby declare and warrant that I am in good health, of sober and temperate habits, and that all the statements and answers to the above questions are complete and true, and that the foregoing, together with this declaration, shall constitute the application and become a part of the contract for insurance hereby applied for; and it is agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full while my health is in the same condition as described in the application. The applicant will please read the answers written after each of the above questions before signing. Signature of person whose life is to be insured. (Signed) John Andrew Salgne." (See page 110 of the record.)

On the medical examination, the insured made the following warranty:

"I hereby warrant that the answers to these questions are true and correct, and that they shall form a part of the contract for insurance applied for. Dated, this 6th day of July, 1905. (Signed) John A. Saigne, applicant's signature." (See page 113 of the record.)

The policy contract was issued in consideration of the application; the following language being in the policy contract: "In consideration of the application for this policy, which is hereby made a part of this contract," etc. (See page 28 of the record.)

THE FIRST FALSE ANSWER MADE BY THE INSURED TO A QUESTION IN THE APPLICATION WAS RELATIVE TO HIS PRIOR REJECTION BY AN INSURANCE COMPANY.

This question was Question 4 (c) of the application, and the question and answer are as follows: "Has any Company or association ever declined to grant insurance on your life, or issued a policy of a different kind or for a sum less than that applied for?" A. "No." (See page 108 of the record for copy of application.)

The answer to this question was as to a material matter, and one affecting the risk to be assumed in the insurance contract contemplated. A rejection by another Company is a material matter. See **American Life Insurance Company vs. Judge, 191 Pennsylvania, p. 484; Finn vs. Metropolitan Life Insurance Company, 70 New Jersey Law, 255; Security Mutual Insurance Company vs. Webb, 106 Federal Reporter, 828; Cooley's Briefs of Insurance, Volume 3, p. 2071,** and cases therein cited.

It is submitted that the undisputed evidence in this cause shows that this answer was false. The application

to the Prudential was made by Salgue on July 6th, 1905. On June 15th, 1905, Salgue had made an application to the Penn Mutual Insurance Company at Macon, Georgia, through its agent, Anderson Clark, for $6,000.00 of insurance. The questions in the Penn Mutual application were answered by Salgue, and this application was signed by him; this Penn Mutual agent took Salgue, the applicant, to the office of Dr. W. J. Little, the regularly appointed medical examiner at Macon of the Penn Mutual. Dr. Little made the medical examination required under this application for the Penn Mutual, and discovered that Salgue had a mitral murmur of the heart, faulty compensation and hypertrophy of the heart, and thereupon told Salgue that he had heart disease; Dr. Little, the examiner, then told Anderson Clark, agent, that Salgue had heart disease, and he could not get the insurance. Clark, the agent, so informed Salgue, and later told him that, if he would pay the medical examiner's fee, he could say in future that he had not been rejected. Salgue paid Clark, the agent, $5.00, and Clark paid it to Dr. Little, the examiner. Dr. Little testified that, in the case of the Penn Mutual Life Insurance Company, it was his duty as examiner to report the result of the examination to the agents of this Company, and that he did so report to Clark, the agent. The testimony of Anderson Clark and Dr. W. J. Little is undisputed, and is as stated above. (For testimony of Anderson Clark, see pages 53 to 58 of the record.) (For testimony of Dr. Little, see pages 58 to 61 of the record.) We submit that this evidence as narrated constitutes in law a rejection. Salgue made application to the Penn Mutual Company and was examined by this Company's regular examiner, and was informed by him that he could not get the insurance because he had heart disease. In this Company, it was the practice for the medical examiner to report the results of his examination to the agent, and this was done, and this report of this examiner was a rejection of Salgue. It is a

fact that no formal notice of rejection ever came to Salgue from the home office of the Penn Mutual Insurance Company, but this is so solely from Salgue's act in paying the medical fee to the agent in order to prevent the papers being sent to the home office.

We submit that where an applicant for life insurance has been rejected by the medical examiner of a company upon the ground of unsound health, he cannot thereafter deny such rejection in applications made by him to other companies upon the ground that the first company has never acted upon his application, its failure to act being due solely to the applicant having, for the purpose of concealment, prevented its transmission to the home office.

The authorities in this country hold that such facts constitute a rejection. The leading case on this point is that of **Edington vs. The Aetna Life Insurance Company, reported in 77 New York Reports, page 564;** 100 N. Y. 536. The head note in this case relative to this point is as follows:

> "To the question in the application as to whether other applications had been made for insurance, and with what result, he answered: 'Yes, always successful.' The defendant proved by the agent of another Company that D. applied to him as such agent for a policy, and signed an application which was returned to the medical examiner of the Company who had previously attended upon D. professionally, and who declined to pass him, stating that the examination would be a farce, as D. was not insurable. This the agent communicated to D. Upon this evidence, which was unquestionable, the defendant moved for a non-suit, which was denied Held (Earle, Justice,) that the delivery of the application

to the agent was a delivery to the Company, that the medical examination formed no part, that the action of the medical examiner was a rejection of the applicant, that the answers were untrue, and even, if innocently made, voided the policy."

On page 571 in the opinion in this case, the Court says:

"Another error of still more vital importance was committed: In 1867, one Windsor was the agent at Geneva of the Mutual Benefit Insurance Company of Newark, N. J., and D. applied to him as such agent for a policy in said Insurance Company; the agent told him that he did not think the Company would take him; in a few days, he applied to the agent again, when he was furnished by him with a blank application, which D. filled out and signed and delivered to the agent; D. and the agent then went to the house of Dr. Eastman, who was the medical examiner of the Company, and who had previously attended D. professionally; not finding the doctor at home, D. left, and when the doctor returned, the agent handed to him the application, and the doctor then said that he could not pass him, that the examination would be a farce, and an unnecessary expense to the Company, that he would have to expose D. if he examined him, and that he was not insurable. The agent afterwards communicated this conversation to D., and the matter was then dropped, and he destroyed the application. There was nothing to cast any suspicion upon this evidence, and it was asserted by the Judge upon the trial to be true, but he submitted the evidence to the jury for them to find whether upon those facts there was an application for insurance within the meaning of the answers above given in the application for the policies now in suit, and the charge was sustained by the general term. Upon this evidence, the defendant

moved at the close of the trial that the plaintiff be non-suited, and its counsel requested the Judge to charge the jury that if they found it true, plaintiffs could not recover, and excepted to the charge upon the subject, and to the refusal to non-suit, and to charge as requested. We think a non-suit should have been granted. This evidence shows beyond question that the application for insurance in the New Jersey Company had been made, and that it had not been successful; Windsor was the agent of that Company to receive such application, and when the application was delivered to him, it was delivered to the Company, and D. had done all that he could or was required to do to place himself in the attitude of an applicant for insurance; in forwarding the application to the office of the Company, Windsor would act, not as his agent, but as the agent for the Company; the medical examination was no part of the application; that was something to be done after the application was made; it was an act to be done, not by D., or at his expense, but by the medical examiner as the agent of the Company, and at its expense; the doctor knew him, and was acquainted with his physical condition, and pronounced him unfit for insurance without an examination; that left the case precisely as though an examination had been made and his application had then been rejected. It was just such information as this that the questions put to the assured in these applications were designed to elicit. The answers were clearly untrue, no matter how innocently they may have been made, and there was nothing upon this branch of the case for submission to the jury, and the Judge should have held that these answers voided the policies."

This case is cited at length, because it is the leading case in this country on this point, and because its facts

are almost identical with the facts in the case at bar, and its findings seem conclusive of our contention that the facts narrated relative to Salgue's application to the Penn Mutual constitute in law a rejection of Salgue by that Company. The case at bar is much stronger than this Edington case; in the Edington case, no medical examination was made of D.; in our case, a medical examination was made by the medical examiner of the Penn Mutual, and that medical examiner made an adverse report to the agent of the Penn Mutual, to whom he was required to report. The Edington case came up again on appeal and is reported in **100 New York 536**. The judgment of the court below directing a verdict for the defendant was affirmed, the Court of Appeals holding that "a false answer was given. The application was made and was not successful. If the truth had been told, the present policy would never have been issued." This case is cited as an authority in the case of the Phoenix Life Insurance Company vs. Raddin, 120 U. S., page 189.

A similar conclusion will be found in the following cases: Ferris vs. Home Life Insurance Company, 118 Michigan, page 485; Mutual Life Insurance Company vs. Nichols, 24 Southwestern Reporter, page 910; Security Mutual Life Insurance Company vs. Webb, 106 Federal Reporter, page 108, affirmed in 126 Federal Reporter, page 635.

In no view could this answer, under the conditions narrated, be considered as "complete and true," as it had been warranted by Salgue to be; the answer to this question could not be "complete and true" until and unless Salgue had communicated to the agent taking his application for the Prudential all the facts relative to his application to the Penn Mutual. Salgue's failure to so inform the Prudential agent was a breach of his warranty to the Prudential. This Honorable Court has held that

an answer to a question, where warranted, as in this case, must not only be true, but must be complete, and any substantial omission in the answer voids a policy issued on the faith of the application. See **Phoenix Insurance Company vs. Roddin, 120 U. S., page 189.**

In connection with this false answer to question 4 (b) in the application, we call attention to the fact that Salgue was given the opportunity to make a full explanation as to the Penn Mutual rejection by question 4 (c) of the application, which followed question 4 (b); the failure of Salgue to answer question 4 (b) of the application truthfully led to his failure to answer question 4 (c) of the application at all; question 4 (b) inquired as to any rejection by any Company; question 4 (c) was: "If yes, give the name of the Company or Companies, and when," (meaning that, if Salgue's answer to question 4 (b) was that he had been rejected, he should, in answer to question 4 (c), give the name of the Company or Companies, and when such rejection occurred). Having answered question 4 (b) falsely, he did not answer question 4 (c) at all. Question 4 (c) of the application gave him the opportunity to make the explanation which must have been in his mind with reference to his transaction with the Penn Mutual Insurance Company.

In connection again with this false answer to question 4 (b) of his application relative to rejection by any other Company, we call attention to a similar false answer given by Salgue to question 13 in the medical examination. This question 13 was as follows: "Has your application for insurance ever been rejected, postponed or modified by an Insurance Company, Assessment Company or benevolent order?" Salgue's answer to this question was: "No." This answer, under the evidence which has been set forth relative to question 4 (b) of the application, was necessarily false, and to this question 13 of

the medical examination (which was practically the same as question 4 (b) of the application), Salgue the second time made a false answer relative to his rejection by the Penn Mutual.

It follows that the Court should have decided from this undisputed evidence relative to this point, that Salgue had been rejected by the Penn Mutual Life Insurance Company prior to the time of his application to the Prudential, and that his answer to question 4 (b) of his application, and his answer to question 13 of the medical examination, in both of which he answered that he had not been rejected, were false, and that these false answers were to a material matter, and one affecting the risk to be assumed, and that by reason of the false answers to this material matter, the policy was voided, and the defendant entitled to a verdict.

THE SECOND FALSE ANSWER MADE BY SALGUE WAS TO QUESTION 4 (d) OF THE APPLICATION.

This question and answer was as follows: "Is application for insurance on your life pending at this time in any other Company; if so, give the name of the Company?" A. "Yes, Provident Savings Life." (See page 109 of the record for application to the Prudential.)

This answer was not "complete and true," as warranted by Salgue. At the time of making this answer, Salgue not only had an application pending with the Provident Savings Life Company, but had pending an application with the Sun Life Insurance Company of Canada, to which Company he had made application for insurance on June 28th, 1905, prior to his making application to the Prudential on July 6th, 1905. (See page 85 of the

record for application to the Sun Life Insurance Company.) The pendancy of this application in the Sun Life was not revealed by Salgue. Salgue was obliged to know that he had this application pending, and so knowing, the law puts the duty upon him, in order that his answer might be complete and true, that he reveal its existence. This was a reasonable matter, and one about which the Company might reasonably require information, and upon which its action might reasonably depend. This question as to the pendency of other applications in other Companies was to a material matter. (See **Penn Mutual Life Insurance Company vs. Mechanics Savings Bank & Trust Company, 72 Federal Reporter, page 417; Home Life Insurance Company vs. Myers, 112 Federal Reporter, page 486; Supreme Lodge K. of P. vs. Few, 138 Ga. 785.**)

This answer was not "complete and true," and not being complete and true, voided the policy. (See Phoenix Insurance Company vs. Reddin, 120 U. S., 189.) The effect of such partial answer is well stated by Judge Taft in the case cited, of the Penn Mutual Life Insurance Company vs. the Mechanics Savings Bank & Trust Company, where the learned Judge says:

> "It is not a true answer to such question (relative to other insurance) to name some of the regular Insurance Companies in which the applicant has some insurance, omitting to name others; such answer necessarily implies that there is no other insurance than that stated, and if there is other insurance, the answer is false."

The undisputed evidence relative to this answer to this question is that this answer was false, and that it was necessarily known to be false to Salgue, and that it was as to a material matter, one affecting the risk to be assumed, and the Court should have so found.

THE THIRD FALSE ANSWER MADE BY SALGUE WAS TO QUESTION 17 OF THE MEDICAL EXAMINATION.

This question and answer were as follows: "When were you last attended by a physician? A. Early spring of 1905. Q. For what complaint? A. Bilious fever, two days." (See page 112 of the record for question 17 of the medical examination.)

The undisputed evidence shows that this answer was false; Dr. McAfee, his family physician, treated Salgue from January, 1905, up to the date of his application to this Company for chronic acid gastritis, and on one day shortly prior to his application, for heart disease. (See pages 61 to 67 of the record for the evidence of Dr. McAfee.) This question and answer were as to a material matter. (See **Cooley's Briefs on Insurance, Volume 3, page 2166; Aloe vs. Mutual Reserve Fund Life Association, 49 Southwestern Reporter, 557.**)

It has been repeatedly held that such a question calls for important information which the insured is bound to give truthfully. (See **McCullom vs. Insurance Company (New York), 27 Northeastern Reporter, page 412; Cobb vs. Association (Mass.), 26 Northeastern Reporter, page 230; Society vs. O'Hara (Penn.), 13 Atlantic Reporter, page 932; Insurance Company vs. McTague (N. J.), 9 Atlantic Reporter, page 766; Cummings vs. Insurance Company, 89 Missouri, page 37; Menger vs. Insurance Company (Penn.), 35 Atlantic Reporter, page 197.**)

The necessary conclusion relative to this answer to this question in the medical examination is that it was false, and that it was necessarily known to Salgue to be false, and that it was as to a material matter, and the Court should have so found.

THE FOURTH FALSE ANSWER MADE BY SALGUE WAS HIS ANSWER TO QUESTION 24 OF THE MEDICAL EXAMINATION.

This question and answer were as follows: "Have you ever had any serious illness? A. No."

At the time Salgue made this answer he had had, and then had, heart disease, and had been so told by three physicians. Dr. W. J. Little, in June, 1905, prior to his application to the Prudential, had discovered Salgue's heart disease, and had told him of it. (See page 61 of the record for Dr. Little's testimony on this point.) Dr. McAfee, his family physician, had discovered his heart disease prior to the time of his making application to the Prudential, and had told him of it. (See page 67 of the record for Dr. McAfee's testimony on this point.) Dr. Ross, at or about the time of his making application to the Prudential, had discovered his heart disease. (See page 68 of the record for Dr. Ross's testimony on this point.)

Salgue, in answer to this question also made denial of the fact that he had and had been treated six months prior to the making of the application for the disease known as chronic acid gastritis. The evidence as to this is undisputed, as is the fact that chronic acid gastritis is a serious illness. (See evidence of Dr. McAfee on pages 61 to 67 of the record, for evidence as to the existence of chronic acid gastritis.) Again, in this connection, it is well to call attention to the fact that chronic acid gastritis is a form of dyspepsia, and that Salgue, in answer to question 23 of the medical examination, was asked specifically if he had ever had dyspepsia, and to that question he answered "No."; so that he denied for the second time the existence of a serious illness with which for months

prior to his application he was afflicted, and for which he was continuously treated, to-wit, the illness caused by chronic acid gastritis. (For question 23 of the medical examiner's report, see page 113 of the record.)

The evidence is conclusive that the answer to this question was false, and that it was known by Salgue to be false, and that it was as to a material matter.

If Salgue had heart disease, he certainly had a serious illness. A serious illness is construed to mean such an illness as has or ordinarily does have a permanent detrimental effect on the system, or renders the risk unusually hazardous, and certainly a layman will know that heart disease has a permanent detrimental effect on the system, and that no Insurance Company will insure a man with heart disease, because such disease renders the risk unusually hazardous. On this direct point the Supreme Court of Georgia has said that heart disease is a serious illness, and the question and answer in reference to it is a material one. (See **Supreme Conclave Knights of Damon vs. Wood, 120 Georgia, page 336.**) That heart disease and chronic gastritis were considered serious illnesses by the Prudential Insurance Company, and no policy would have been issued to an applicant so affected, is shown by the testimony of Dr. Burrage, Medical Director of the Prudential, when he said, "I consider chronic gastritis a serious illness, and I consider organic heart disease a serious illness; if Salgue had, in answer to question 24 upon the medical examination, stated that he had chronic gastritis or heart disease, it would have resulted in any insurance company refusing him insurance." (See page 108 of the record.)

THE FIFTH QUESTION TO WHICH SALGUE MADE A FALSE ANSWER WAS QUESTION 16 OF THE MEDICAL EXAMINATION, WHICH WAS AS FOLLOWS: "Q. ARE YOU IN GOOD HEALTH? A. YES."

The falsity and materiality of this question and answer will be apparent in the discussion later in this brief in connection with the point that this policy never became effective because it was never delivered to Salgue while he was in good health.

The foregoing questions to which false answers were made by Salgue have been set forth in order that it may be seen exactly what fraud was perpetrated upon this Company in the matter of this policy contract. The evidence cited in the record as to these false answers was conclusive and uncontradicted. These false answers were all relative to matters which were material to the risk about to be assumed by the Insurance Company. These false answers were all known to be false by Salgue. It follows necessarily that the trial court should have directed a verdict in this action for the Insurance Company, by reason of the fraud practiced upon it by these false answers of Salgue. The evidence, being uncontroverted, should not have been submitted by the Court to the jury. The legal effect of the falsity of the answers should have been passed upon by the Court. Where, as in this case, the facts are uncontradicted, the materiality of the representation is a question for the determination of the Court, and not of the jury. In this connection, see Penn Mutual Life Insurance Company vs. Miller, 92 Federal Reporter, page 63; Home Life Insurance Company vs. Myers, 112 Federal Reporter, page 846.

It is also well settled under the general law that if, as

in this case, the misstatements relate to facts within the knowledge of the assured, and these misstatements relate to facts material to the risk, the motive of the applicant in making the misstatements is immaterial, and the policy is voidable. See Finn vs. Metropolitan Insurance Company, 70 New Jersey Law, page 255; Fletcher vs. Bankers Company, 119 New York Sup., 801; Insurance Co. vs. Montgomery, 116 Georgia 805; Supreme Conclave Knights of Damon vs. Wood, 120 Georgia, page 334.

While this is the general law, it is especially important in this cause in considering the effect of these false answers that it be borne in mind that this insurance policy was a Georgia contract. The application was taken in Georgia, the premium paid and the policy delivered in that State. This makes it a Georgia contract. (See Fidelity Mutual Life Insurance Company vs. Jeffors, 107 Federal Reporter, page 408; Society vs. Pettus, 140 U. S., page 226.)

As a Georgia contract, it should be construed by the laws of Georgia. The statute of the State of Georgia relative to breach of warranty, where the policy issued is, under the law, a Georgia contract, must be accepted. The statute of Georgia relative to breach of warranty by an applicant for insurance, is as follows:

"Every application for insurance must be made in the utmost good faith, and the representations contained in such applications are considered as covenanted to be true by the applicant; any variation by which the nature or extent or character of the risk is changed will void the policy." (Code of Georgia of 1895, section 2098.) This section has been construed many times by the Supreme Court of Georgia, and it has uniformly been held, in construing it, that a false answer made by an applicant for insurance to a question contained in the application in-

volving a material matter, which false answer was warranted to be true, would void the policy, whether such false answer was or was not made with fraudulent intent. See Southern Life Insurance Company vs. Wilkinson, 53rd Georgia, page 550; Northwestern Insurance Company vs. Montgomery, 116 Georgia, 805; Supreme Conclave Knights of Damon vs. Wood, 120 Georgia, page 335; Aetna Life Insurance Co. vs. Conway, 75 Southeastern Reporter, 915.

In the case at bar the language of insured's warranty imports a warranty, but under the law of Georgia, whether the language imports a warranty or not, representations are covenanted to be true and are warranties. See Supreme Conclave vs. Wood, 120 Ga., page 335.

The only distinction made by the Supreme Court of Georgia in considering an insurance warranty and in considering warranties in reference to other contracts, is that the breach of a warranty as to any other kind of contract in Georgia voids the contract, whereas the breach of an insurance warranty in Georgia voids the insurance contract only when such warranty is as to a material matter tending to vary the nature, character or extent of the risk assumed in the insurance contract by the insuring Company. It is respectfully submitted that this is the law of Georgia, and this was a Georgia contract, made under this law, and that this Georgia law, being controlling, the trial court was obliged, where the undisputed evidence shows that the insured had made false answers to certain questions contained in his application and medical examination, and had warranted such false answers to be true, where such answers warranted to be true were material, and such as to affect the nature of the risk assumed, to declare the policy void, and direct a verdict for the insuring Company.

It is interesting, in this connection, to note that former Circuit Judge Taft, in the case of the Penn Mutual Life Insurance Company vs. the Mechanics Savings Bank & Trust Company, 72nd Federal Reporter, page 418, has construed the statute of Pennsylvania, which is similar to this Georgia statute, and has given the same construction to the Pennsylvania statute as is given by the Georgia court to the Georgia statute.

WHILE IT WAS NOT NECESSARY TO THE VOIDING OF THIS POLICY THAT THE FALSE ANSWERS MADE BY SALGUE IN HIS APPLICATION SHOULD HAVE BEEN MADE WILFULLY, IT IS SUBMITTED THAT THE ENTIRE RECORD IN HIS CASE WILL DISCLOSE THAT SALGUE DID INTENTIONALLY AND WILFULLY MAKE THE FALSE STATEMENTS TO WHICH ATTENTION HAS BEEN CALLED, AND MADE THEM FOR THE PURPOSE OF FRAUDULENTLY PROCURING THIS INSURANCE.

A brief recital of his efforts toward obtaining insurance, and the answers made in other applications for insurance, will conclusively show this. His first application was to the Penn Mutual on June 15th, 1905. Salgue wanted originally only $5,000.00 of additional insurance. He already had $4,000.00 of old insurance, and he agreed with the first agent who approached him, to-wit: the Penn Mutual agent, to make application for $6,000.00 of insurance, so that he would have $10,000.00. (See testimony of Anderson Clark, on page 54 of record.) After he was rejected by the Penn Mutual, he immediately started to get additional insurance. He was rejected by the Penn Mutual on June 15th. On June 28th, he applied to the Sun Life of Canada for

$6,000.00. (See page 85 of the record.) On June 30th, he applied to the Provident Savings Life for $5,000 insurance. (See page 96 of record.) On July 6th, he applied to the Prudential for $5,000.00. (See page 109 of the record) and on July 8th, to the Aetna for $6,000.00. (See page 40 of record.) And on July 13th, to the Volunteer State Life for $5,000.00. (See page 76 of record.) Starting out with the evident purpose of securing only $6,000.00 of insurance, he actually applied for, excluding the Penn Mutual's $6,000.00, $27,000.00 of insurance. Of this $27,000.00, $6,000.00 was issued by the Sun Life of Canada, $5,000.00 by the Provident Savings, $5,000.00 by the Prudential, $6,000.00 by the Aetna, and $5,000.00 of the Volunteer State Life was rejected. Of the amount issued, Salgue took them all except that issued by the Provident Savings Life; he wanted originally $6,000.00 of insurance; he actually took $17,000.00.

In not a single one of his applications to these Companies did he name all of the other Companies to which he had applied for insurance. After he was rejected by the Penn Mutual, he applied to the Sun Life Insurance Company of Canada for a policy, the date of the application to this Company being June 28th, 1905. (See page 85 of the record.) His next application was to the Provident Savings Life Assurance Society, which he made June 30th, 1905. (See page 96 of the record.) In this application, the following question was asked him:

"Are you negotiating for life insurance? If so, state in what organization, and for what amount." To this question, he answered: "No." At this time, his application was pending in the Sun Life Insurance Company.

His next application was to the Prudential. (See page 108 of record.) In this application, he was asked: "Is an application for insurance on your life pending at this time

in any Company? If so, give name of Company." To this, he answered "Yes, Provident Savings Life."

He failed to name the application which he had made to the Sun Life of Canada.

His next application was made to the Aetna Life, and in this application, he was asked the question: "Has any proposal or application to insure your life been made to any Company, association or agent on which a policy of insurance is now pending, or has any such proposal or application ever been made for which insurance has not been granted or on which a policy or certificate of insurance was not issued in full amount, and of the same kind as applied for? If so, state particulars and the names of all such Companies, associations or agents." To this question Salgue answered: "None," though, at that time he had applications pending with the Sun Life, the Provident Savings Life and Prudential Life.

Salgue's next application was to the Volunteer State Life. In this application, he was asked: "Is an application for insurance on your life pending at this time in any other Company? If so, give name of the Company." In answer to this, he replied: "The Prudential and Aetna," although at that time applications were pending in the Sun Life, the Provident Savings Life, the Aetna and the Prudential.

Any one of the applications to any one of these other Companies, upon examination, will show that the material questions as to his health and to his attendance by physicians prior to the time of his application, and as to the pendency of other applications, were all falsely answered.

For instance, in his application to the Aetna, question

14 was as follows: "What are the names and residences of all the physicians whom you have personally employed or consulted during the last five years?" A. "Dr. James T. Ross, Macon, Ga."

The evidence discloses that this answer was necessarily false, as he had been continuously treated by Dr. McAfee for chronic acid gastritis from Jan. 1st, 1905, up to the date of this examination.

Question 19 of the Aetna application is: "Has any physician expressed an unfavorable opinion on your life with reference to life insurance?" His answer to this question was "No," though at that time he had been told by Drs. Little, McAfee and Ross that he could not get life insurance because of his heart trouble.

In his application to the Volunteer State Life, he was asked in question 4 (b): "Has any physician ever expressed a doubt as to your insurability?" To which he answered: "No," though at the time he made this answer, Drs. Little, McAfee and Ross had told him he was not insurable on account of his heart trouble.

In his medical examination by the Volunteer State Life, he was asked in question 24: "How long since you were attended by a physician or professionally consulted one?" To which he answered: "Three months for a bad cold three or four days," though at that time he must necessarily have known that he was treated by Dr. McAfee as before stated.

In his application to the Sun Life Insurance Company, question 16 was as follows: "Has any physician ever given an unfavorable opinion regarding your health? Give details." To which his answer was: "No." This answer was necessarily false, as Drs. Little, McAfee and

Ross had rendered unfavorable opinions prior to this time.

Question 17 of the Volunteer State Life application is as follows: "Has any application been made by you to any Company or agent, and afterwards withdrawn or not yet completed? Give details." To which he answered: "No." This answer gave Salgue full opportunity to state the truth about his Penn Mutual application. Instead of stating the truth, he denied that he had made any application to any Company or agent, and afterwards withdrawn it, or that it was not yet completed.

These false answers in the applications made by Salgue to the other Companies are given to illustrate that the false answers made to the Prudential were all wilfully made.

Judge Taft, in his decision in the case of Penn Mutual Insurance Company vs. Mechanics Savings Bank & Trust Company, 72 F. R., 413, says:

> "In determining whether a false statement in respect to other insurance was made innocently or not, it is competent to show that in answers to similar questions in applications for other policies, the assured made answers equally untrue."

The presence of these false answers in the other applications but emphasizes the fraud with which the false answers were made by Salgue in the Prudential application and medical examination. The undisputed fact of these false answers and the legally indisputable conclusion of their fraud should have compelled the Court to direct a verdict for this defendant. There was legal fraud in Salgue's false answers: We feel confident that the record discloses that there was moral fraud on Salgue's part. Certainly there was such legal fraud as would void the

policy. There is fraud in law if a man makes a representation which he knows to be false with the view to induce another to act on the faith thereof, who does so accordingly, and by so doing sustains damages, although he may have had no dishonest purpose in making the representation. If a man knowingly and wilfully makes a false representation whereby another is misled to his prejudice, it is immaterial that there may have been no intention on his part to benefit himself or to injure the person to whom the representation was made. See Northwestern Insurance Company vs. Montgomery, 116 Ga. 808.

In the case of Webb vs. Security Mutual, 126 Fed. 635, a case in which the facts were quite similar to the case now under consideration, Judge Hook, speaking for the Circuit Court of Appeals for the Eighth Judicial Circuit, uses the following language:

> "An applicant for a policy of insurance has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit. Nor will good faith excuse him if the answer is untrue. * * * The answer which was given to the question was untrue instead of being true and full and complete, as it should have been, and therefore the policy of insurance obtained from the defendant by means of such answer is void."

All of the facts on which the admitted misstatements of the insured in this case were made were clearly material to the risk. They related to the rejection by the Penn Mutual Company, to recent treatment by a physician for a serious illness, to the pendency of an application to the Sun Life Insurance Company and to the condition of the applicant's health; they were all facts peculiarly within the knowledge of the insured, and of which the insuring Com-

pany had no knowledge, relying entirely upon the truth of the statements made by the insured. They were all of such recent occurrence as must have impressed themselves upon the insured's mind. In this situation the false answers as to these matters peculiarly within the insured's knowledge necessarily voided the policy.

See Henn vs. Metropolitan Insurance Company, 67 New Jersey Law 310;

Dimmick vs. Metropolitan Life Insurance Company, 69 New Jersey Law 384;

Silox vs. Grand Fraternity, 76 Atlantic Reporter 1018.

Under these circumstances we submit that the petitioner was entitled to have the court direct a verdict in its favor.

(2) THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT, THE PRUDENTIAL INSURANCE COMPANY ON THE GROUND THAT THE UNCONTRADICTED EVIDENCE CONCLUSIVELY SHOWS THAT THE POLICY WAS NEVER ISSUED AND DELIVERED TO SALGUE WHILE HE WAS IN GOOD HEALTH.

Salgue warranted in his application that he was in good health, and agreed that the policy should not take effect until issued and delivered to him while he was in good health. This warranty was broken, and it was a warranty as to a material matter. Its breach voided the policy. He was not in good health on the date of the issuance and delivery of the policy. He had, at the time the policy was delivered to him, and for over six months prior to that time, chronic acid gastritis. He had at the time

the policy was delivered to him, heart disease, and he had been so informed by three doctors, and had, prior to the delivery of the policy to him, been treated for heart disease by one doctor. The policy was delivered to him on July 29th, 1905, and check for the premium was that day issued and delivered to C. M. Adams, agent of the Prudntial Insurance Company at Macon, Ga., the check being issued by the Bibb Brick Company, for which Company Salgue worked. (For check, see page 164 of the record.) The fact that the policy was delivered on July 29th is shown not only by the date of the check, but by the evidence of C. M. Adams, the agent of the Prudential, who testifies that the policy was delivered to Salgue at Mr. Moore's office. Mr. Adams testified: "As to what happened at that time, when I went out with the policy, Mr. Salgue stated that he had gotton in some other insurance, and he didn't know whether he could afford to take my policy or not; I remarked it was a little peculiar, and contended for my policy, I didn't know there was anything like that coming up; and Mr. Moore remarked: 'You take the policy, and I will pay for it,' and Mr. Moore gave me his check for the premium, and accepted the policy." (See page 44 of record.) The qustion arises then as to what was the condition of Salgue's health on July 29th, 1905. On June 15th, 1905, Dr. Little had discovered that Salgue had heart disease, and had so informed him. (See record, pages 58 to 61 for testimony of Dr. Little.) Prior to the application to the Prudential, and prior to the delivery of the policy to Salgue, to-wit: In June, 1905, or early in July, 1905, Dr. J. C. McAfee had discovered the diseased condition of Salgue's heart, and had informed him of it, and either on July 3rd or July 13th, had treated him for heart disease. (For evidence of Dr. McAfee, see pages 61 to 67 of the record.) Prior to the delivery of the policy to Salgue, he was examined by Dr. Ross, and Dr. Ross discovered the diseased condition of his heart, and informed him of it. (For evidence of Dr. Ross, see pages 67 and 68

of the record.) Prior to the delivery of the policy to Salgue, to-wit: on July 13th, Salgue was examined for insurance by Dr. McHatton, on an application filed by Salgue with the Volunteer State Life Insurance Company, and on that date, the diseased condition of his heart was discovered by Dr. McHatton. (For testimony of Dr. McHatton, see pages 69, 70 and 71 of the record.) These four doctors had, prior to the delivery of the policy to Salgue on July 29th, 1905, discovered positively the diseased condition of his heart, and three of these doctors had informed Salgue of that condition. The evidence of the other doctors in the case to wit: the evidence of Dr. W. R. Winchester (see page 48 of the record), of Dr. C. C. Harrold (see page 124 of the record), and of Dr. R. E. Barron (see page 136 of the record), and of Dr. G. P. Gostin (see page 141 of the record) was simply to the effect that, in their examinations of Salgue, they had not discovered the diseased condition of his heart. Salgue's heart was affected with a mitral murmur; the evidence was undisputed that this murmur might be detected at one time, and not be detected at another time; (see testimony of Dr. Little on page 69 of the record). We then have four doctors who swear positively to the existence of the diseased condition of Salgue's heart prior to and at the time of the delivery of the Prudential policy to him, to wit: on July 29th, 1905, and the testimony of the other doctors named to the effect that they did not discover the diseased condition of his heart, and the testimony to the effect that the peculiar diseased condition which he had might at one time be discovered and at another time not be discovered, but would be existent all the time. Moreover, Salgue died within eleven months of the date of the issue of the Prudential policy to him, with heart disease. He had been treated in March and April, 1906, by Dr. McHatton for the same heart trouble that Dr. McHatton discovered on July 13th, 1905. Dr. McHatton testified as follows: "My original opinion of the man's con-

dition was confirmed when I saw him the last series of visits that I made him, his condition was exactly what would have been expected, taking into consideration his condition at the time of the examination on July 13th, 1905 (the last series of visits was in March and April, 1906). That was the progressive course of the disease, the continuance of the original organic disease. * * * If he died on May 22, was found dead lying on a railroad seat on a train, or sitting on a seat, that would have been the natural course, that would be one of the natural terminations of his type of disease; they very often in that condition, after they get to that point, die suddenly, and certainly, if he died in that manner, either sitting at home, or on a train, without a struggle, that confirms my opinion of the existence of the disease on July 13th, 1905. No, sir, there wasn't in any one of those subsequent visits, anything to indicate that I was mistaken; I just went on and treated him for increased heartweakness." (For testimony of Dr. McHatton on this point, see page 69 of the record.) The evidence was conclusive that Salgue had this heart disease at the time he was examined, and at the time the policy was delivered to him, and that he died from this same heart disease. The evidence was undisputed that at the time of the application and the delivery of the policy, Salgue was affected with chronic acid gastritis. (See evidence of Dr. McAfee, pages 61 to 67 of the record.)

The conclusion is irresistible that Salgue was not in good health at the time this policy was delivered to him. Good health, as defined by Cooley, means that "The applicant is free from any disease or ailment that affects the general soundness and the healthfulness of the system." See Cooley's Briefs on Insurance, page 2110. Where it is provided in the application that the policy shall not take effect until delivery has been made while the applicant is living or in good or sound health it is clear that,

under such conditions, delivery would impose no liability on the insurer unless at the time the insured is in good health. Cooley's Briefs on Insurance, volume one, page 451. The authorities are uniform that where the application contains an agreement to the effect that the policy shall not take effect until delivery has been made while the insured is in good health, delivery of the policy while the insured is in good health constitutes a condition precedent to the liability of the Company on the policy. See Reese vs. Fidelity Mutual Life Insurance Company, 111 Georgia, 482; Few vs. Supreme Lodge K. of P., 136 Ga. 181; Clark, Admr., vs. Mutual Life Insurance Company, 129 Ga. 571. No obligation is assumed by the Company until the first premium has been paid. * * * Nor unless upon this date, the insured is in good health. See Gallant vs. Metropolitan Life Insurance Company, 167 Mass., page 179; Barker vs. Metropolitan Life Insurance Company, 188 Mass., 542; Packard vs. Metropolitan Life Insurance Company, 52nd Atlantic Reporter, 287; McClave vs. Mutual Life Reserve Association, 55 New Jersey Law, page 188; Anders vs. Life Insurance Company, 87 Northwestern Reporter, 331; Ormond vs. Association (North Carolina) 1 Southeastern, 796; Oliver vs. Insurance Company of Virginia 33rd Southeatsern 536; Volkar vs. Metropolitan Life Insurance Company, 21 New York Sup., 456; 25 Cyc. page 719.

It is respectfully submitted that on this ground the Court should have directed a verdict for the defendant.

III.

THE COURT COMMITTED ERROR IN REFUSING TO CHARGE THE JURY AS REQUESTED BY THE PRUDENTIAL INSURANCE COMPANY.

At the conclusion of the evidence in the case, the Pru-

dential requested the Court to charge the jury as follows:

"The defendant, the Prudential Insurance Company of America, requests the Court to charge as follows: question 4 (b) of the application of said John A. Salgue to the defendant, the Prudential Insurance Company of America, is as follows: 'Has any Company or association ever declined to grant insurance on your life, or issued a policy of a different kind or for a sum less than that applied for? (Answer yes or no.)' The answer to this question is 'no.' The defendant insists that this answer is false, and says that the said Salgue, in the month of June, 1905, prior to the time of making this application applied to the Penn Mutual Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance, and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, examiner for the said Penn Mutual Company, for examination, and that Dr. Little, as such examiner, examined the said Salgue, and stated to the said Salgue that he had heart trouble, and for that reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of an application for insurance made to it by said Salgue, and if you believe from the evidence that such application was made, and that such declination was made, then I charge you that the answer of Salgue to this question was false, and that it was warranted to be true, and that it was as to a material matter which would tend to change the nature, extent and character of the risk assumed, and that, in this event, the plaintiff could not recover."

The request for this charge was made in writing before the jury, prior to the charge of the Court, and before the

No. 47.

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JAMES H. McK

Supreme Court of the United States

OCTOBER TERM, 1912.

PRUDENTIAL INSURANCE COMPANY OF AMERICA
Petitioner

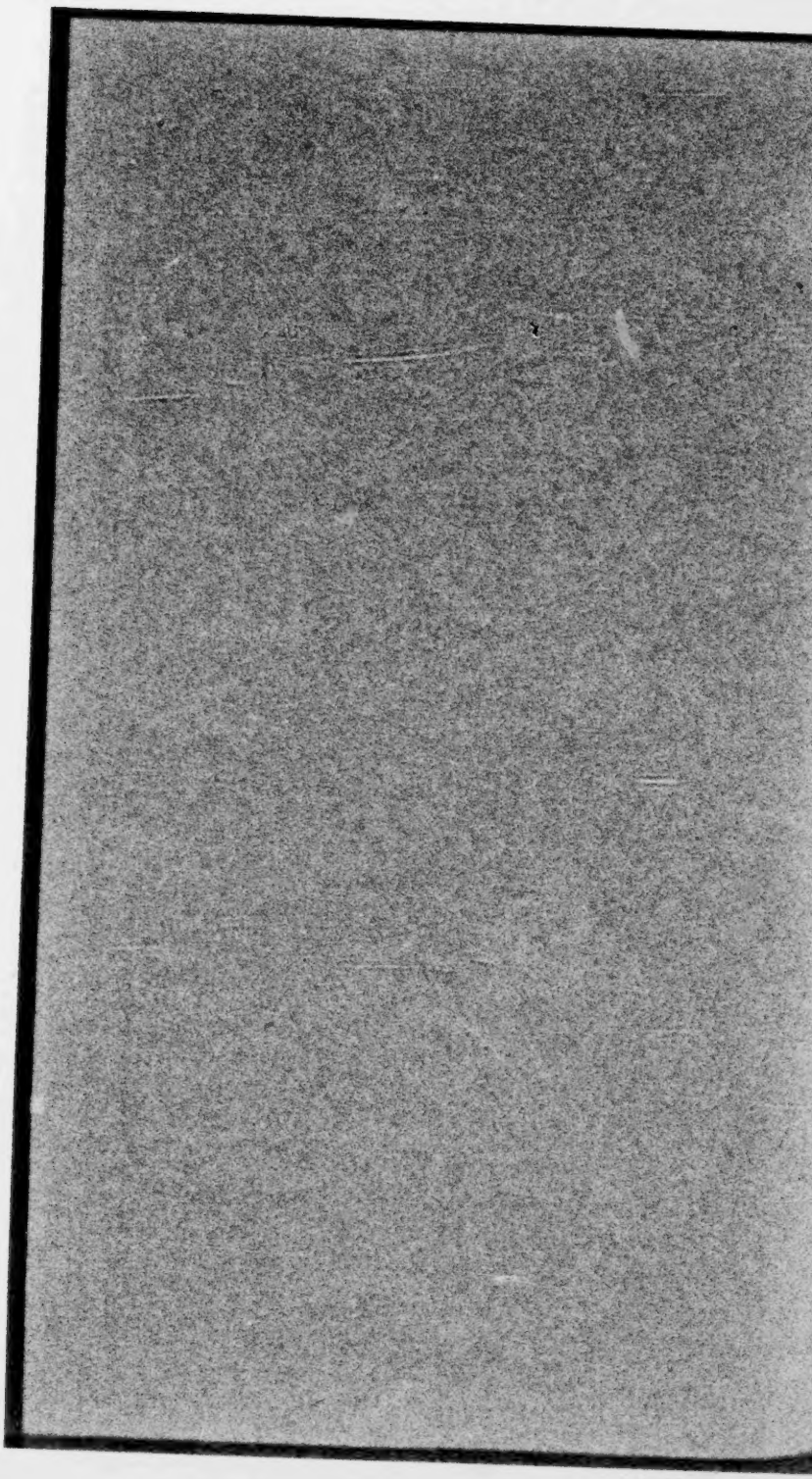
versus

JOHN T. MOORE, Administrator of John A. Salgue, Deceased
Respondent

Brief and Argument

OF

MINTER WIMBERLY,
ALEXANDER AKERMAN,
JESSE HARRIS,
Of Counsel for Respondent.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 337.

PRUDENTIAL INSURANCE COMPANY, OF AMERICA,
Petitioner.

vs.

JOHN T. MOORE, ADMINISTRATOR JOHN A. SALGUE, DECEASED,
Respondent.

Writ of Certiorari, United States Circuit Court of Appeals for the Fifth Circuit.

Brief and Argument of Minter Wimberly, Alexander Akerman and Jesse Harris, of Counsel for Respondent.

STATEMENT OF THE CASE.

John T. Moore, administrator of the estate of John A. Salgue, filed suit against The Aetna Life Insurance Company and the Prudential Life Insurance Company of America, in the Circuit Court of the United States for the Western Division of the Southern District of Georgia, alleging that on the 10th day of July, 1905, the Prudential Life Insurance Company of America, entered into a contract, whereby it insured the life of John A. Salgue in the sum of five thousand dollars.

At the same time, the said John T. Moore, administrator, filed in the same court a petition against The Aetna Insurance Company, and alleged that The Aetna Insurance Company entered into a contract, whereby it insured the life of John A. Salgue in the sum of six thousand dollars.

Petitioner alleged that both companies were indebted to the petitioner on said policies, as administrator, and that he, as administrator, had complied with all the terms and conditions of the policies.

The defendants filed separate answers admitting that a contract of life insurance had been entered into between them and John A. Salgue, and admitted the proof of loss was made, but denied that they were indebted to said administrator, both insurance companies pleading that gross fraud was practiced upon them by the insured in the procurement of said policy, the answer setting forth in what particulars this fraud was perpetrated. The case against the two companies was called for trial, and on motion of plaintiff in the court below, the trial court passed an order consolidating the two causes of action. Exception was filed by both defendants to the order consolidating the two causes.

The case proceeded to trial and evidence was introduced by plaintiff establishing the allegations in the petition. Defendant introduced oral and documentary evidence, and after argument of counsel and charge of the court, the jury found a verdict in favor of the plaintiff in both cases.

Afterwards both defendants, hereinafter called the companies, filed their writ of error to the Circuit Court of the United States for the Southern District of Georgia from the United States Circuit Court of Appeals for the Fifth Circuit.

Both cases were argued at length by brief and oral argument in the said Circuit Court of Appeals for the Fifth Circuit, and both cases were affirmed.

Thereupon both companies filed their petition in this Honorable Court for writ of certiorari and this Honorable Court granted the writ.

BRIEF AND ARGUMENT.

The assignments of error made by the defendant in the trial court, on which they maintain that this Honorable Court should reverse the rulings of the Circuit Court and Circuit Court of Appeals, can be grouped under three heads:

First: The order of the trial judge consolidating for trial the action brought against this defendant with the action brought by the same plaintiff against the Aetna Insurance Company upon a policy of life insurance issued by it upon the life of the said Salgue.

Second: The refusal of the trial judge to direct a verdict in favor of the petitioner.

Third: The refusal of the trial judge to charge the jury as requested.

I.

CONSOLIDATING THE CAUSES.

On the error assigned as to consolidating the causes, we respectfully submit that this was a proper exercise of the discretion of the trial court.

The authority of the judge in making this order is given in Section 921 of the Revised Statutes of the United States, which is as follows:

> "When causes of a like nature or relative to the same question are pending before a Court of the United States, or of any territory, the Court may make such orders and rules concerning proceedings therein as may be conformable to the usages for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

Under this section, we respectfully submit that the trial court had full power to consolidate the causes, and in reviewing this alleged error, this court must take into consideration the fact that at the time the order of consolidation was entered, the trial court took the position that from an inspection of the pleadings, as will be seen from the records in both of these cases, that the same plaintiff was suing two insurance companies on two similar policies of life insurance upon the same life, issued about the same time, to which suits substantially the same defenses were interposed by the pleadings.

Under these circumstances, it would have been a waste of time to have tried the cases separately.

This Honorable Court has previously ruled that the consolidation of causes of like nature is within the discretion of the trial court, and this discretionary power of the court will not be set aside on bill of exceptions or writ of error.

> "Under Rev. Stat. Sec. 921, a Court of the United States may order actions against several insurers of the same life, in which the defense is the same, to be consolidated for trial against their objection."
>
> Mutual Life Ins. Co. *v.* Hillman, 145 U. S., 285.

And in the above stated case, Mr. Justice Gray, for the Court, said on page 293:

> "The learning and research of counsel have produced no instance in this country in which such an order made in the exercise of the discretionary power of the Court, unrestricted by statute, has been set aside on bill of exceptions or writ of error."

It will be noted that no exception is taken to any ruling of the Court on the question of jury strikes, or the right of counsel for both defendants to be fully heard, nor is any exception taken to the charge of the Court in submitting the separate issues to the jury. It will be further noted that

after the introduction of evidence the insurance companies did not move to withdraw the case from the jury and declare a mistrial.

The record shows conclusively that this plaintiff in error was not injured in any way by the order excepted to.

II.

THE REFUSAL OF THE COURT TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT.

Petitioner in this Honorable Court excepts to the refusal of the Court to direct a verdict for two reasons:

(a) Because certain answers of the insured to material questions asked him in his application for insurance and in the medical examination for such insurance, were shown by the undisputed evidence to be false, thereby voiding the policy.

(b) Because the undisputed evidence disclosed that the policy was never delivered to the insured while he was in good health and under the insurance contract, its delivery while he was in good health, was a condition precedent to the policy contract taking effect.

(1) The policy was voided by reason of incomplete and untruthful answers made by the insured to material questions asked him in the application and medical examination.

We respectfully contend that the questions asked in the application for insurance were truthfully answered by the insured. One of the questions, which petitioner in this Honorable Court claims was answered falsely by the insured, was as follows: "Has any COMPANY or ASSOCIATION ever declined to grant insurance on your life, or issued a policy of a different kind, or for a sum less than that applied for?" A. "No." (See Record, page 108.)

The Insurance Company contends that this was a false answer, and thereby voided the policy, citing as authorities American Life Ins. Co. *v.* Judge, 191 Pa., 484; Finn *v.* Metropolitan Life Ins. Co., 70 N. J. Law., 255; Security Mut. Ins. Co. *v.* Webb, 106 Fed. Rep., 828; Cooley's Briefs of Ins. Vol. 3, p. 2071; but from a careful inspection of these authorities, it will be noted that they were based upon the proposition that the Insurance COMPANIES had made a rejection of the application, and that the Companies themselves had made this rejection after the application had been submitted to them for their approval; but in the case at bar, the question in the application was: "Has any COMPANY or ASSOCIATION ever declined to grant insurance?" and the Company claims this answer was false for the reason that the insured had been rejected by the Penn Mutual Life Insurance Co. prior to his application in the Prudential Company, but the record does not substantiate this contention, because the testimony of Anderson Clark, agent of the Penn Mutual Life Insurance Co. (Record, pages 53 to 58), shows that the Penn Mutual Company did not reject the insured; but that the application was not delivered by him, acting as the agent of the Penn Mutual Life Insurance Company, but was destroyed, and the insured, Salgue, was informed by this agent that he could truthfully answer that he had not been rejected by the *Penn Mutual Company.*

There can be no dispute that all insurance contracts are to be strictly construed against the insurance company. If the defendant company had required the insured to state whether or not any APPLICATION had been refused by any insurance company, and the applicant had answered that particular question falsely, then there may be some merit in that contention.

Of course the defendant company contends that the question of the medical examination covers this particular question in the original application for insurance, but under the peculiar circumstances of the application of the insured in the Penn Mutual Company and the sayings and doings of the agent of the Penn Mutual Life Insurance Company, we

respectfully submit that the question referred to in the medical examination was the truth.

The proposition has been sustained by a great weight of authorities that all policies of insurance and applications must be construed against the insurer and in favor of the insured; that all statements in the appliction will be construed as representations rather than warranties.

Havan *v.* Scottish Union & Natl. Ins. Co., 186 U. S., 423,

Phoenix Mut. Life Ins. Co. *vs.* Raddin, 120 U. S., 183,

Home Life Ins. Co. *v.* Fisher, 188 U. S., 726.

First Natl. Bank *v.* Hartford Fire Ins. Co., 195 U. S., 673,

Franklin Fire Ins. Co. *v.* Vaughn, 92 U. S., 516,

Mutual Benefit Life Ins. Co. *v.* Higginbotham, 95 U. S., 380,

Knickerbocker Life Ins. Co. *v.* Trefz, 104 U. S., 197,

Vol. 25 Cyc., 796 to 815,

Penn Mut. Life Ins. Co. *v.* Mechanics' Savings Bank & Trust Co., 72 Fed., 413.

Distinguished counsel for the insurance company rely on the case of Edington *vs.* Aetna Life Ins. Co., 77 N. Y. Rep., page 564 and 100 N. Y. Reports, page 536, but it will be noted that that case and the case at bar are not similar. The question in the application in the Edington case was whether other APPLICATIONS had been made for insurance, and with what results, which question, applicant answered "Yes; always successful."

In the case at bar, the question was asked: "Has any COMPANY or ASSOCIATION ever declined to grant insurance on your life?" The answer of the insured was "No." The distinction being that one question required an answer as to whether or not any INSURANCE COMPANY had declined to grant insurance, and in the case cited by the distinguished counsel, the question was whether any other APPLICATIONS had been made for insurance in other

companies; and the testimony of Anderson Clark (Record, pages 53 to 58) and testimony of Dr. Little (Record, pages 58 to 61), we respectfully submit, does not as a matter of law constitute a rejection by the insurance company. However, that was a question of fact which the court properly submitted to the jury for their determination.

Distinguished counsel contend that the failure of the insured to answer question 4 (b) in the application necessitated a false answer to question 4 (c), which required the insured to state the names of the company or companies who had rejected him for insurance. As before stated, the insured answered truthfully that he had not been rejected by the Penn Mutual Company, and, therefore, we respectfully contend that the answer to this question was the truth. At least if not the truth as far as the Company was concerned, according to their theory of the question, it caused such disputed issue of fact that a jury should decide whether or not the question was truthfully answered.

It must be remembered that the answers to the questions in the application were made in the handwriting of the agent, Adams, and from his testimony (Record, page 45), it will be seen that he had knowledge of the fact that the insured had made application in other companies save that of the Provident Savings Life, as the answer states. It is more than probable that the insured mentioned the different companies to whom he had made application, and the agent only deemed it necessary to insert the name of one, to-wit, Provident Savings.

The testimony of John T. Moore showed that the insured told the different agents of his application in numbers of different companies and that he had requested the policies to be delivered to him for his inspection, and that he was under the impression that this same remark was repeated to Mr. Adams at the time he made the application to the Prudential Life Insurance Company. The insured, no doubt, acting upon the advice of the agent, who was soliciting the sale of an insurance contract, did not consider that his application in other insurance companies was such that it was necessary to insert this particular answer to question 4 (c) of the

application, and it must be borne in mind that the insured being now dead, cannot deny that he did not inform the agent of the applications in different companies, but it is a reasonable inference to draw from the testimony of Adams, agent, and Mr. Moore, employer, which shows conclusively, and would authorize the jury in believing, that the applicant stated truthfully and fully in answer to all questions that were asked him in the application, and the agent wrote down such portions of the answer as he thought necessary, and, therefore, we respectfully contend that this was a disputed issue of fact, and the Court properly submitted this issue to the jury for them to settle this disputed fact.

The insurance company contends that the procurement of the policy of insurance was by fraud of the insured. The record absolutely refutes this contention.

In the Aetna Insurance Company case, from an inspection of that record, which we presume this Honorable Court will take into consideration in a decision of this case, especially since petitioner has had a part of that record made a part of the record in this case, it will be seen that the insured informed the soliciting agents, Ray and Hawkins, of what Dr. Little had informed him about the condition of his heart. Also the testimony of Dr. Harrold, the medical examiner of the Aetna Insurance Company, and after an examination by Dr. Harrold, after having passed other examinations of medical experts of other insurance companies about the same time, he was informed that he did not have heart trouble, and therefore, when he answered question 24 of the medical examination that he did not have any serious illness, this answer we respectfully contend was the absolute truth. He believed that he did not have heart trouble. The testimony of a number of witnesses was to the effect that he did not have heart trouble. The testimony of Dr. Gostin (Record, page 141), who last treated the insured, was that he did not die of heart trouble; therefore, can it be said, upon such a conflict of testimony as to whether or not the insured was afflicted with heart trouble, could the Court, as a matter of law, hold that the answer was false, and, therefore, would void the policy; or could the Court

under such conditions of conflicting facts refuse to submit these disputed facts to a jury for them to find their conclusions?

In the case of Supreme Conclave Knights of Damon *v.* Wood, 120 Ga., 336, on which case the distinguished counsel for the insurance companies greatly rely, the Supreme Court of Georgia in the opinion in this case, held on page 337, the following:

> "In reading the brief of evidence, we find that the testimony was conflicting as to whether the insured was or was not afflicted with heart disease at the time of his application for insurance. The physician who treated him testified that in his opinion the applicant was at the time afflicted with the disease. The Company's physician, who made an examination at the time of the application, testified that in his opinion the applicant had at that time no sign or symptom of the diesease. This will be a question for the jury to decide upon the next trial."

Applying the principle laid down in the above decision to the case at bar, we respectfully contend that there was a sharp conflict of the different medical experts in the case whether or not the insured was afflicted with heart trouble at the time of his application, and undoubtedly the Court committed no error in submitting this sharp conflict of facts to be settled by the jury.

The insurance company contends that Salgue made a false answer to question 16 of the medical examination, which was as follows: "Are you in good health?" to which question he answered "Yes." The company contending that this answer was false, and that the Court should have, as a matter of law, found that the answer was false, and should not have submitted the same to the jury to decide. The insurance company contending that this particular fact was uncontradicted, and that this was a material representation, and that the Court should determine the same and not the jury.

The position of the Company as to this point is not tenable.

The testimony of John T. Moore (Record, p. 149) that for four years the insured lost only two days from his work and that he worked 12 to 16 hours a day; that he was a man of robust health and had no appearance of ever being sick. The testimony of Jordan Massee (Record, p. 158) was that he was "the strongest and most robust chap I ever knew in my life," and that he had never heard him complain of having any stomach trouble or dyspepsia. The testimony of E. L. Reeves, a neighbor, was that he was a very healthy man. The testimony of Mrs. John A. Salgue (Record, p. 161) that during her entire married life with him, his health was always good, and that he never complained of any trouble except about two or three weeks before his death; and that this trouble started from lifting something heavy at the brick yard; and we respectfully contend that the answer to this question was the absolute truth, and the Court could not as a matter of law determine that the same was false.

It is undoubtedly true that the policy in this case is a Georgia contract, and necessarily it follows that the law of Georgia will therefore, be applied in construing and considering the contract; but the construction of the Georgia law will be taken in connection with the law, as construed by the courts of the United States, relating to contracts of life insurance.

The statute law of Georgia applicable to the case at bar will be found in the following sections of the Code of Georgia of 1910, Vol. 1:

> Sec. 2479. "Application, good faith. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed, will void the policy."

Sec. 2480. "Effect of misrepresentation. Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, *bona fide*, and so informs the insurer, the falsity of the information does not void the policy."

Sec. 2481. "Concealment. A failure to state a material fact, if not done fraudulently, does not void; but the wilful concealment of a fact, which would enhance the risk, will void the policy."

Sec. 2483. "Wilful misrepresentation voids policy. Wilful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to any other insurance, or as to any other material inquiry made, will void the policy."

Sec. 2499. "Law of fire insurance applicable. The principles before stated as to fire insurance, wherever applicable, are equally the law of life insurance."

We respectfully contend that the evidence for both the plaintiff and the defendant in the court below clearly establishes the fact that there was no fraudulent concealment of any material fact and no wilful concealment of any fact that would enhance the risk.

If the insurance procured, was with a fraudulent purpose on the part of the insured as against the company, or by means of representations which were intentionally fraudulent, even though they relate to matters not material, the policy is voidable; but to constitute such fraudulent representations as to void the policy on that ground, the representation must be made by the insured with the knowledge of its falsity and with intent that it be acted upon, and it must be actually acted upon by the company to its injury.

The testimony of John T. Moore shows conclusively that Salgue, the insured, told the agent of the Prudential Insurance Company, Mr. Adams, that he had other applications pending.

The testimony of Mr. Adams showed that he knew that the insured had other applications pending. Therefore, it cannot be successfully contended that there was any fraudulent concealment as to this question by the insured. This being true, the policy will not be void.

Ley *v.* Metropolitan L. I. Co., 120 Ia., 203,
Patten *v.* U. S. L. I. Co., 141 N. Y., 589,
Vol. 25 Cyc. of Law & Procedure, 796.

The insurance company contends that the insured intentionally and wilfully made false statements and made them for the purpose of fraudulently procuring this insurance.

The record shows that he made application for insurance in a number of companies, but it also shows that these applications were made for the specific purpose of selecting from among the entire number of insurance companies the policy which he thought was the best, and the agents of each of these insurance companies were apprised of this particular fact. The testimony of each agent, when closely scrutinized, shows that they had knowledge that other insurance companies were trying to sell the insured contracts of insurance.

Adams, agent for the Prudential Company, knew it. While he did not state in so many words that he had knowledge of this fact, yet when this Honorable Court refers to the Record, page 163, the letter of Adams to the agent of the Insurance Company in New Jersey, it will be shown conclusively that before Adams, as agent of the Prudential Company, delivered the policy, that he had knowledge that another insurance company was seeking to sell the insured a life insurance contract, and he requested the Prudential Co. to send him two policies, bearing out the theory and the testimony of witnesses to the effect that the

insured only desired the policies for the purpose of investigation, and not for procuring a large amount of insurance on his life, with the idea and for the purpose of fraud upon the insurance companies; and we respectfully contend that the charge of the insurance company that the insured intentionally and wilfully made these false statements for the purpose of procuring fraudulent insurance is absolutely without merit, but to the contrary the evidence shows that a number of the policies, which he had at the time of his death, were forced upon him over his objections. The obligation that he incurred for the payment of the same was in one instance procured by fraud of the insurance company, to-wit: the Aetna Life Insurance Company.

We respectfully contend that the insurance company is estopped from denying the fact as to whether he had other applications at the time he filed an application to the Prudential Company, for the reason that Adams, the agent of the company, had knowledge that he had applications in other companies, and the agent of the company was acting for the company; and this particular agent prepared the application, and, therefore, the company is bound by the knowledge of the agent.

> "When agents prepare the application of the insured, or make any representation to him as to the character or effect of the statements of the application, they will be regarded in so doing, as the agents of the insurance company, and not of the insured."
>
> Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall., 222,
> American L. I. Co. *v.* Mahone, 21 Wall., 152,
> New Jersey Mut. L. I. Co. *v.* Baker, 94 U. S., 610.

> "Where soliciting and forwarding applications for policies of insurance was within the scope of the duties of an agent of an insurance company, and such agent undertook to prepare for another an application for insurance, and wilfully inserted

therein a false answer to a material question, he will be regarded in so doing as the agent of the company and not of the applicant, and the agent's knowledge of the falsity of the answer will be imputed to the company."

Clubb v. The American Accident Co., of Louisville, Ky., 97 Ga., 502.

"Although in such case, the application was, by its terms, a part of the contract of insurance, and was signed by the person to whom the policy was subsequently issued, if the latter was fraudulently misled and deceived by the agent as to the contents of the application in the respects indicated, and was in fact ignorant that it contained the false answer in question, the company will not be allowed to avoid the policy on the ground of a false warranty in relation to that answer."

Clubb *v.* The American Accident Co., of Louisville, Ky., 97 Ga., 502.

"When an insurance company delegates to an agent the authority to take insurance, and to negotiate for the company in making its contracts of insurance, it likewise impresses him with all of the responsibilities which the law will attach to a person in his situation, and he is the agent of the company."

German-American L. Ins. Co. *v.* Farley, 102 Ga., 735.

"Where in a written application for insurance, which is prepared by the agent of the company who solicits the insurance and delivers the policy, the applicant makes certain statements as to his physical condition, as to the general state of his health, and as to his rejection by other insurers to whom he has previously applied for insurance, which

statements are warranted by him to be true, and which if false, might materially effect the risk, a policy of insurance which recites that it is issued in consideration of such statements and of certain other valuable considerations therein expressed, but which does not in terms provide that it shall be void in the event such statements of fact should prove to be untrue, is not avoided as a consequence of the mere falsity of any of such statements, where it appears that even if they were false, they were not fraudulently made, and that the fact that they were false was known to the agent of the insurer, who had himself prepared the application and procured the applicant to sign it."

German-American Mut. L. I. Co. *v.* Farley, 102 Ga., 720.

"When the law of the state provides that a person who solicits or procures applications for insurance shall be held to be the agent of the insurance company, and such agent fills up the application, his act in doing so is the act of the company."

Continental L. Ins. Co. *v.* Chamberlain, 132 U. S., 304.

"Agent soliciting insurance is the agent of the Company."

Clubb v. American Accident Co., 97 Ga., 502.

"Where written proposals for insurance are prepared by the insurer's agent, both questions and answers must be regarded as the act of the insurer, especially where true answers were in fact made by the applicant and the agent substituted others for them, thus misrepresenting the applicant as well as deceiving his own principals."

American L. Ins. Co. *v.* Mahone, 21 Wall., 152.

"Where the insurer's agent prepares the applications for insurance, the insurer is not relieved from responsibility for the acts of the agent by reason of the fact that the answers as written by the agent were subsequently read to the applicant and signed by him."

American L. I. Co. *v.* Mahone, 21 Wall., 152.

"Knowledge by one employed as a solicitor of fire insurance, who delivered the policy of insurance to the insured and received the premiums, of material facts relative to the state of the title and the use to which the property was put at the time of the issuance of the policy, is imputable to the company. This will estop the company from setting up a defense based upon a provision in the policy that it should be void if the interest of the insured be 'other than unconditional and sole ownership.'"

Springfield Fire Ins. Co. *v.* Price, 132 Ga., 687,
Johnson *v.* Aetna Ins. Co., 123 Ga., 404,
Mechanics Ins. Co. *v.* Mutual Bldg. Assn., 98 Ga., 262.

"Restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract, where it appears that the agent has delivered it, and received the premiums, with full knowledge of the actual situation."

Wood *v.* American Fire Ins. Co., 149 N. Y., 382.

We respectfully contend further that if any of the answers were not complete and were imperfectly answered, the issuance of the policy without further inquiry, especially when the insurance company has been put on notice, as in the case at bar, amounts to a waiver of objection and makes the omission immaterial.

"The issuance of a life insurance policy without further inquiry as to a question imperfectly answered, or not answered at all in the application, is a waiver of objection thereto, making the omission immaterial."

Phoenix Mut. L. I. Co. *v.* Raddin, 120 U. S., 183.

We respectfully contend that it was not necessary for Salgue, in answer to the question, to state the names of physicians he consulted for merely slight or temporary indispositions.

"In analogy with the rule as to disclosure of temporary or slight ailments, it is held that medical consultation or attendance for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction of the language of the application."

McLain *v.* Provident L. I. Co., 110 Fed., 80,
Hubbard *v.* Mutual Reserve Fund L. I. Co., 100 Fed. Rep., 719.

We further respectfully contend that this particular question is not a warranty, but is a representation. The courts on similar questions have construed that they were representations rather than warranties.

"Questions and answers as to whether or not insured had ever had certain specified diseases, or any other serious ailment, held representations though called warranty."

Minn. Mut. L. I. Co. *v.* Lee, 230 Ill., 273.

III.

THE REFUSAL OF THE TRIAL JUDGE TO CHARGE THE JURY AS REQUESTED.

Exception was made to the refusal of the Court to charge the jury as follows:

> "The defendant, the Prudential Insurance Company of America, requests the Court to charge as follows: question 4 (b) of the application of said John A. Salgue to the defendant, the Prudential Insurance Company of America, is as follows: 'Has any company or association ever declined to grant insurance on your life, or issued a policy of a different kind or for a sum less than that applied for? (Answer yes or no.)' The answer to this question is 'no.' The defendant insists that this answer is false, and says that the said Salgue, in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance, and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, examiner for the said Penn Mutual Company, for examination, and that Dr. Little, as such examiner, examined the said Salgue, and stated to the said Salgue that he had heart trouble, and for that reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of an application for insurance made to it by said Salgue, and if you believe from the evidence that such application was made, and that such declination was made, then I charge you

that the answer of Salgue to this question was false, and that it was warranted to be true, and that it was as to a material matter which would tend to change the nature, extent and character of the risk assumed, and that, in this event, the plaintiff could not recover."

We respectfully submit that the Court properly declined to charge the jury as requested, for the reason that the Court could not as a matter of law hold that because the insured had made application to the Penn Mutual Insurance Company for a policy, and the application was withdrawn that this would be an untruthful answer to the question, "Has any *insurance* company ever *declined* to grant insurance on his life?" and the Court could not as a matter of law hold that the answer to this question was false, and that the same being false, plaintiff could not recover, so the Court very properly declined the request, and submitted to the jury for their determination whether or not the answer was true or false; and we respectfully contend, and the evidence warrants this contention, that when the insured answered that he had not been declined INSURANCE by any COMPANY, he answered the truth, as the Penn Mutual Insurance Company had never declined insurance on his life. His application had been withdrawn, and the company had never acted on it; and it frequently happens that the examining physician in a number of instances have reported unfavorably upon an application and the home office of the insurance company has issued the policy notwithstanding; therefore, the applicant answered truthfully that the Penn Mutual Company had not rejected him.

The policy of the law is to avoid forfeitures of insurance policies and the great weight of authorities lay down the broad proposition that all that is required of the insured in his application for life insurance is for him to act in perfect good faith with the company; and when there is a dispute as to the questions of fact, as in the case at bar,

the trial court should submit these questions of fact to the jury to settle.

The company alleged gross fraud. They alleged that the insured knew that his condition was such that he would be a poor risk to the insurance company, and with this knowledge, set out purposely to procure large amount of insurance for the express purpose of defrauding this particular insurance company and others, but the record shows exactly the contrary. A number of insurance companies, through their agents, were beseeching the insured, both day and night, to sell him contracts of insurance. They followed him from his place of business to his home. They procured policies ready to be delivered. They used fraudulent methods in making him obligate himself to pay for policies that he thought he had ordered out only for examination as to the ones he would accept. The Provident Life Insurance Co. was ready to deliver to him one or more policies, which he declined. The Sun Life Insurance Company had policies ready for him to accept, which he refused to accept until months afterwards, and the policy of the Prudential Insurance Company, the petitioner in the case at bar, was only accepted after the employer of the insured had agreed that he would advance the money to pay the premium.

Can it be said that under this undisputed, uncontradicted proof, that Salgue intentionally, wilfully and fraudulently procured insurance contracts for the purpose of defrauding the insurance companies?

Adams, the agent of the company, knew that Salgue had no fraudulent intentions when he was trying to sell him the contract of insurance, and this very policy now in litigation was only accepted by the insured upon the promise of John T. Moore, the employer of the insured, that he would advance sufficient amount of money for him to pay the premium.

We respectfully contend that where a question of fraud is raised in the trial of a similar issue, as in the case at bar, the good character alone, according to eminent author-

ity, is sufficient, where there is a disputed issue of fact, to allow a jury to settle such questions.

A number of witnesses testified that the character of the deceased was above reproach, and we respectfully contend that when the insurance company attempted by the defenses interposed to attack the character of the deceased, and the proof of his good character being undisputed, this would be a substantial plea for the trial court to permit the jury to settle the disputed facts in the case.

German-American Mut. L. I. Co. v. Farley, 102 Ga., 720.

In conclusion, we respectfully submit that from an inspection of the charge of the trial court, it will be readily seen that the same was fair, impartial and submitted the propositions of law correctly, with proper instructions to the jury.

The Court could not as a matter of law hold that certain answers to certain questions were false, as this was a disputed issue of fact, and, therefore, the trial court properly submitted these disputed issues of fact to the jury to settle; and we respectfully submit that the verdict, as affirmed by the Circuit Court of Appeals, should be affirmed by this Honorable Court.

Respectfully submitted,

MINTER WIMBERLY,
ALEXANDER AKERMAN,
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PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* MOORE, ADMINISTRATOR OF SALGUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 47. Argued November 6, 1913.—Decided December 22, 1913.

Aetna Insurance Co. v. *Moore*, *ante*, p. 543, followed to effect that it was error not to charge the jury that a statement made by an applicant for life insurance that he had never been rejected by any company, association or agent after he had withdrawn an application on the advice of the medical adviser with knowledge that the company for whom the examination was made would reject him, is material and untruthful.

Where the policy itself expressly provides that it cannot be varied by anyone except an officer of the company issuing it, the company is

not estopped to contest the policy on the ground of misrepresentations or concealment in the application because its agnt has knowledge of actual conditions.

THE facts, which involve the validity of averdict and judgment on a policy of life insurance, are stated in the opinion.

Mr. Eugene R. Black, with whom *Mr. anders McDaniel* and *Mr. Edward D. Duffield* were on the brief, for petitioner.

Mr. Minter Wimberly, with whom *Mr. Alexander Akerman* and *Mr. Jesse Harris* were on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opnion of the court.

Action upon a policy of insurance for $5,000 issued by petitioner, herein called the insurance company, upon the life of John Andrew Salgue. It was consdidated and tried with the case against the Aetna Company, and resulted in a verdict for the amount of the policy, upon which judgment was entered. It was affirmed by the Circuit Court of Appeals and the case was then brought here. Though consolidated in the District Court with the other case, it is here upon a separate record and submitted upon a separate argument. It, however, involves some of the same fundamental questions.

Salgue, in his application for insurance, declared and warranted that he was in good health and that all the statements and answers to the questions put to him were complete and true, and that the declaration should constitute a part of the contract of insurance applied for. He further agreed that the policy should not take effect

until the same should be issued and delivered by the company while his health was in the same condition as described in the application.

Certain provisions were made part of the policy, among others, that "no agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information."

On the medical examination he declared as follows: "I hereby warrant that the answers to these questions are true and correct, and agree that they shall form a part of the contract of insurance applied for." The questions in the application and the answers thereto were as follows:

"Has any company or association ever declined to grant insurance on your life, or issue a policy of a different kind or for a sum less than that applied for?"

Answer: "No."

"If 'yes,' give name of company or companies and when."

(No answer was given to this question.)

"Is application for insurance on your life pending at this time in any other company; if so, give the name of the company."

Answer: "Yes; Provident Savings Life."

"When were you last attended by a physician?"

Answer: "Early spring of 1905."

"For what complaint?"

Answer: "Bilious fever, two days."

"Have you ever had any serious illness?"

Answer: "No."

"Are you in good health?"

Answer: "Yes."

There was testimony in the case tending to show that these answers were untrue; that he had chronic acid

gastritis and heart disease and that other applications for insurance were pending, and others not granted. And it is urged that, the answers to the questions above stated being in the negative, he omitted to answer other questions which were material to be answered in order to make his statement complete and truthful; that, therefore, his omission to answer amounted to a fraudulent concealment.

Error is assigned on the ruling of the court refusing to direct a verdict for the insurance company and refusing certain special instructions.

The policy is conceded to be a Georgia contract and it is contended that the warranties contained in the application were all material to the risk and that they were all broken (1) because the evidence showed that the answers to the questions were false, thereby avoiding the policy; (2) the policy was not delivered to Salgue while he was in good health, that being a condition precedent to its taking effect, and (3) the policy was void by reason of incomplete and untruthful answers. This, it is urged, is the effect of the Georgia law, which, while it modifies the imperative character of statements by an applicant for insurance as warranties, yet provides that any variation from the facts stated "by which the nature, or extent, or character of the risk is changed will void the policy." Section 2479, Code of Georgia.

The insurance company, therefore, to sustain its contention that a verdict should have been directed for it, must establish that the representations were material to the risk and that they were untrue. Whether they were untrue is a question of fact and as the proposition of law which the insurance company relies upon is exhibited by the special request we shall pass to the consideration of the latter. It presents the question of the materiality of Salgue's statements to the risk as one of law. The court submitted it to the jury as a question of fact and

made as elements of decision Salgue's motive, his good or bad faith, his mistake or fraud in making the representations. This, we think, is the sense conveyed by the charge of the court, as we said in *Aetna Life Ins. Co.* v. *Moore*, just decided, notwithstanding there are here and there qualifying words and a distinction made between misrepresentation of facts and the concealment of them. A few excerpts from the charge will illustrate this. After defining a warranty the court said: "On the other hand, representations are statements made to give information to the insurer, and otherwise induce it to enter into the insurance contract and unless *distinctly material and made with fraudulent purpose* (italics ours), do not void the policy. . . . Substantial integrity of conduct on the part of both insurer and insured is the prime object the law seeks to obtain. . . . The law of Georgia, while requiring that every application for insurance must be made in the utmost good faith, and that representations are considered as covenanted to be true, otherwise the policy will be voided, also provides that a failure to state a material fact, if not done fraudulently, does not void the policy. On the other hand, the wilful and fraudulent concealment of such a fact which would enhance the risk of the company will have the effect to void it. What is here stated to be true of wilful concealment is also true of wilful misrepresentation by the applicant to his agent as to any material inquiry made. It follows that under the law of Georgia, a misrepresentation in statement or a concealment of fact must first be material, or must be wilfully or fraudulently made in order to annul the insurance."

After further explanation, the court said:

"These are the general principles. To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of

which he had knowledge? If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications? And, third, in connection with this your inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done. In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

This being the charge of the court, wherein did it militate against the special request which is as follows:

"The defendant, The Prudential Insurance Company of America, requests the court to charge as follows:

"Question 4–B of the application of said John A. Salgue to the said The Prudential Insurance Company of America is as follows: 'Has any company or association ever declined to grant insurance on your life or issued a policy of a different kind or for a sum less than that applied for? (Answer 'Yes' or 'No')'. The answer to this question is 'No.'

"The defendant insists that this answer is false and says that the said Salgue in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, Examiner for the said

Penn Mutual Company, for examination and that Dr. Little, as said Examiner, examined the said Salgue and stated to the said Salgue that he had heart trouble and that for this reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue, and if you believe from the evidence that such application was made and that such declination was made, then I charge you that the answer of Salgue to this question was false and that it was warranted to be true and that it was as to a material matter which would tend to change the nature, extent and character of the risk assumed and that in this event plaintiff could not recover."

It is contended that the instruction was "legal and pertinent" to the issue and was not incorporated in the charge of the court. The court, we have seen, did not incorporate the instruction in its charge, and that the instruction was legal and pertinent to the issue between the parties is shown by the opinion in the *Aetna Case*.

The instruction based on the facts stated was peremptory of the right of the insurance company to recover. But respondent contends that the requirement was either void or that the agent of the company wrote down and reported the answer, knowing the facts, and therefore the company is estopped to dispute the correctness of the answer or its completeness. There was testimony in the case upon which the contention could be based. But the case was not submitted to the jury in that view. This phase of the case, as its other phases, was made to turn upon the good faith of Salgue, not upon the materiality of the fact or the action of the agent of the insurance company. The court stated to the jury that the contention of the insurance company was that the transaction with the Penn Mutual showed a rejection of Salgue's application

by that company, "to be determined by the court as a matter of law." With the contention the court said it was unable to agree, "and leaves the question to the jury, it being a mixed question of law and fact."

The testimony in regard to the application to the Penn Mutual is the same as in the *Aetna Case*. We need not repeat it. It may be that it cannot be literally said that any company or association had rejected an application by Salgue. If that had been the question, and regarding sense, rather than form, it could be contended that the answer was untruthful. But the question asked Salgue was broader. He was asked "if any company or association ever declined to grant insurance" on his life, and the further question was put: "If so, give the name of the company or companies," to which he gave no answer. He was also asked, "Is application for life insurance on your life pending at this time in any other company; if so, give the name of the company?" To the latter question he answered: "Yes; Provident Savings Life." At that time he had an application pending with the Sun Life Insurance Company of Canada. The answers were, therefore, not true, and we think that they were material to the risk within the meaning of the Georgia Code. *The Aetna Insurance Company* v. *Moore*, *ante*, p. 543.

It is contended here, as in the *Aetna Case*, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited there. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent. We may, however, observe that Salgue did not inform the medical examiner in this case, as he did in the *Aetna Case*, that he was told he had heart disease. In other words, he made no communication to the examiner which modified in any way the positive character of his answers to the questions put to him. The testimony is conflicting as to the in-

formation he gave to the agent of the company, who, the evidence shows, prepared the application.

We think, therefore, that the court erred in refusing the special request.

It is also contended, as it was in the *Aetna Case*, that the District Court erred in consolidating the causes, and it must be admitted that petitioner here has more ground of complaint of the ruling than the Aetna Company. We are, however, not required to pass upon the contention, though, as we said in the other case, there are grounds for it.

Judgment reversed and cause remanded to the District Court for a new trial.

MR. JUSTICE PITNEY dissents.

SEATTLE, RENTON & SOUTHERN RAILWAY